UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	. Case No. 01-1139 (JFK)
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W.R. GRACE & CO.,	. Courtroom A, 54th Floor
	. U.S. Steel Tower
	. Pittsburgh, PA
Debtor.	.
	. July 19, 2005
. . . . .	. 8:42 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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By: SARAH EDWARDS

THE CLERK: All rise.

THE COURT: Are you ready?

UNIDENTIFIED SPEAKER: Ready.

THE COURT: Okay. Please be seated. This is the matter of W.R. Grace, Bankruptcy Number 01-1139. It's pending in the District of Delaware. The participants I have listed by phone are: Edward Westbrook, Theodore Taconelli, John O'Connell, Jack Cohn, March Coleman, Laurie Sinayin, Matthew Kramer, Elizabeth Power, Shaun Walsh, Thomas Whelan, Tiffany Cobb, Michael Lastowski, Michael Davis, Elisa Alcabes, Andrea D'Ambra, Paul Norris, Dan Cohn, Christopher Candon, Elizabeth DiChristopher, Jennifer Scoliard, Jason Pacorney, Francis Monaco, Jonathan Brownstein, Carrie Mumford, David Klauder, Sarah Edwards, Sander Esserman, and David Parsons. Please, folks, put your mute buttons on until you're speaking, and when you do speak identify yourself for the record. I'll take entries of those of you in Court who wish to enter appearances, please.

MR. BERNICK: Good morning, Your Honor. David Bernick for Grace.

MS. BROWDY: Your Honor, Michelle Browdy, for Grace.

MS. BAER: Janet Baer for Grace.

MR. CARICKHOFF: David Carickhoff for Grace.

MS. KRIEGER: Arlene Krieger for the unsecured creditors committee.

THE COURT: Just a second, please.

MR. KRUGER: Lewis Kruger for the unsecured creditors' committee.

MR. LOCKWOOD: Peter Lockwood for the asbestos claimants' committee, Your Honor.

MR. FINCH: Nathan Finch for the asbestos claimants' committee, Your Honor.

MR. HURFORD: Mark Hurford for the asbestos claimants' committee.

MR. BAENA: Your Honor, Scott Baena on behalf of the P.D. Committee.

MR. SAKALO: Good morning, Your Honor. Jay Sakalo on behalf of the P.D. Committee.

MR. FRANKEL: Good morning, Your Honor. Roger Frankel, Swidler Berlin, for the futures representative.

MR. WYRON: Good morning, Your Honor. Richard Wyron --

THE CLERK: We don't pick you up. You need a mike.

MR. WYRON: Richard Wyron of Swidler Berlin for the futures representative.

MR. BECKER: Good morning, Your Honor. Gary Becker from Kramer Levin for the equity committee.

MS. DILUIGI: Good morning, Your Honor. Brenda DiLuigi of Linklaters for London Market Insurers.

MR. CRAIG: Good morning, Your Honor. Andrew Craig

from Cuyler Burke for Allstate Insurance Company.

MR. LONGOLZ: Good morning, Your Honor. Edward Longolz from Eckert Seamens for Maryland Casualty.

MS. CARMICHAEL: Good morning, Your Honor. Linda Carmichael, White and Williams, for Century Indemnity Company.

MS. ALCABES: Good morning, Your Honor. Elisa Alcabes, Simpson, Thacher and Bartlett.

THE COURT: I'm sorry?

MS. ALCABES: Elisa Alcabes, Simpson, Thacher and Bartlett, for Travelers.

MS. DECRISTOFARO: Good morning, Your Honor. Elizabeth DeCristofaro for Continental Casualty Company.

THE COURT: Ms. DeCristofaro, I couldn't hear you. I couldn't pick it up, what you were saying.

MS. DECRISTOFARO: Okay. Elizabeth DeCristofaro for Continental Casualty Company.

THE COURT: Thank you.

MR. GLOSBAND: Good morning. Dan Glosband from Goodwin Proctor, also for Continental Casualty.

MR. WISLER: Good morning, Your Honor. Jeffrey Wisler of Connelly Bove on behalf of Zurich Insurance Company, Zurich International, and Maryland Casualty.

THE COURT: Okay. Mr. Bernick?

MR. BERNICK: Your Honor, I think we're going to proceed with some of the administrative matters to get them out

of the way, and I think that there are really two principal orders of business today. One is the CMO for property damage, and the other is the CMO for personal injury. And I'll be addressing those, but Ms. Baer will talk about the orders that should be entered on that --

THE COURT: All right.

MR. BERNICK: -- what are essentially the two matters.

MS. BAER: Good morning, Your Honor. Janet Baer on behalf of W.R. Grace. Your Honor, Agenda Items Number 1 and 2 you've already entered orders on. Agenda Items 3 and 4 are the CMO matters which we'll be taking up momentarily.

Agenda Item Number 5 was the motion of the State of Montana for relief from the automatic stay. The State of Montana asked that we adjourn this matter until the August 29th meeting for status.

THE COURT: That's fine.

MS. BAER: Your Honor, Agenda Items Number 6, 7, 9, and 10 are omnibus objections that have been continued from time to time. All of those matters are being continued, and I'll hand up all four orders at one time.

THE COURT: All right.

(Pause)

THE COURT: Okay. They're all signed.

MS. BAER: Your Honor, that then leaves Agenda Items

3, 4, and 11, which Mr. Bernick will address.

THE COURT: Mr. Bernick?

MR. BERNICK: Your Honor, would it be all right if I took off my jacket?

THE COURT: No, you have to suffer all day, Mr. Bernick.

(Laughter)

MR. BERNICK: Well, any way I can get sympathy.

THE COURT: I should explain, gentlemen. It gets so hot in this courtroom. Any time you want to take your jacket off it's fine. You don't need a broken arm to do it.

(Laughter)

THE COURT: And ladies, too. That applies to you, if you have jackets you wish to take off.

MR. BERNICK: Your Honor, I'm going to try to speak from over here because I have a variety of materials to display to the Court. But essentially what I think would be a workable format today is just begin with the property damage, take that all the way through, and then proceed with personal injury.

THE COURT: That's fine.

MR. BERNICK: And what I then am going to do, as I was actually walking over, back to the office, or actually back to the hotel last night, I happened to pass by the Smithfield Church I think it's called, and they had a sermon with an interesting title. Its title was "Indecision produces

flexibility." "Indecision produces flexibility." And I kind of thought about all the resonances that had with respect to this case. I kind of wondered, well, gee, if we're inflexible, does that mean that we'll get the right kind of decisions from them? And I said, well, no, that's not going to work either, but I did decide that inevitably, while we all want to draw lines today and focus on certain things, we should just have people stand up and essentially cover all the issues that they've raised, because I know Your Honor's style, you want to listen to all of those different issues.

At the end of the day, we believe that the business that has to be accomplished today is to get these orders in place and on the P.I. side to get the questionnaire in place. But I know that inevitably the argument will turn to broader matters, so I'm just going to take on -- be flexible and take on all the different matters that I think have been raised, both with respect to property and also with respect to personal injury. At the end of the day they'll focus on the concrete pieces of paper that we believe need to be entered here.

Essentially the CMO that we've proposed with respect to property damage is --

THE COURT: Mr. Bernick, I'm sorry, but somebody is going to have to move that board. It's covering about the lower third of your --

MR. BERNICK: I'll just --

THE COURT: Thank you.

MR. BERNICK: We've proposed a case management order that proceeds in a stage-wise form. Essentially what we're trying to do is to marry the objection process which has been designed to handle a very large number of claims that can be, we believe, disposed of very readily without a lot of labor-intensive adjudications, to handle that up front, but to marry it to the estimation stage. There would be little point served if we actually had to value theoretically the cost of removing asbestos from a building where there's not even been the authority to prosecute the claim, so we have got this staged approach. And pursuant to Your Honor's suggestion, I think it was in the April hearing, Your Honor said I want to see the road map of what issues get set out, and when they get set out, and when they get resolved. And essentially, in this first phase we would take on the question of is there an authority to prosecute the claim, and this Your Honor will hear affects a huge number of claims, and then what are called the gateway objections, where you have an incomplete proof of claim, insufficient documentation, no product I.D. where there has been a prior settlement so that the claim actually has been disposed of.

Now, do we have to get decisions on all of those matters before we get to the next phase? It would be nice. It would be nice to do that, and therefore we have said that there

should be hearings scheduled when Your Honor is available to take up these threshold matters. Inevitably there will be some overlap, and we don't want the schedule to be contingent upon Your Honor issuing orders by certain dates because that puts all the pressure on Your Honor and is better borne by the parties. So, to the extent that we don't resolve all of these matters, we hope to resolve many of them, and we then can proceed to the next phase. The next phase identifies two principle issues that we believe carry through a huge number of claims, if not really all of the claims, there will be some exceptions, and can be addressed up front. One is the issue about how does -- what kind of data, what kind of methodology for gathering data satisfies the Daubert standard which requires reliability, and can be considered by the Court for purposes of determining whether the asbestos in a given building needs to be removed. That is, whether there's a risk that warrants its being removed. And as I'll get back to in a minute, that is a general question. That's the very question that we asked Judge Newsome to resolve in the Armstrong case, which he did resolve spanning hundreds of claims. Secondly, constructive notice. Constructive notice is based on a reasonableness standard. The P.D. Committee has taken issue with how we articulate that principle of law. It would be our position that if we're wrong about that principle of law, and that means that you have to have every single building owner

come in, Your Honor, can decide that. We don't think that that's what the law says at all. We think the whole purpose of constructive notice is really to enable the Court to short circuit questions of, well, yes I did know, or no I didn't know, or something like that. If the market knows the individual building owner or claimant is deemed to know as a matter of law. So, that is issue is tee'd up. Again, no ruling is required. Your Honor would have to consider all of this evidence in any event if everything were postponed until the end. But the idea is not to postpone it.

We then come to all remaining issues in the determination of what dollar figure should attach to these various claims. The rationale for proceeding in this step-wise fashion is very clear and well-known to Your Honor, and, if only to, in a good-natured way, annoy Mr. Baena, I promised him that I would show this chart today. He said, you've got to show the chart today, so I'm going to show the chart. Here's the chart that shows, as Your Honor is well aware, that as of the time that this case was filed, essentially the property damage litigation was on its last steps. We're down to a total of, I think, that seven cases were pending as of 2001, when the case was filed. By contrast, however, even though the marketplace has been operative -- I mean, this litigation goes back decades. I think the last Grace Monokote or fireproofing product that contained asbestos was sold in 1973, so we're

talking about a product that was taken off the market decades ago. Well, the marketplace of litigation was sensitive to the fact that these claims were old claims. You were in fear of them brought not because people got fired. God knows there was huge amounts of money to be made in this litigation. Grace paid out hundreds of millions of dollars in this litigation. So, there was no lack of economic incentive. And the litigation wore down because basically the marketplace was concluding that the statute of limitations had run, that this was a piece of litigation whose time had come and gone. We then see, by contrast, that once the bar date was set in this case, we got 4,000 claims that are lodged, and that cannot be real. We all know it can't be real, and the question therefore is how to get to the bottom of which of these claims really is a viable claim given the applicable law.

What then becomes the rationale for why the CMO proceeds in the fashion that it does? It's essentially this, and these are kind of rough orders of magnitude of how we think it's actually going to occur. We think that the objections, particularly to Mr. Speights's claims, he's got 75 percent of all the claims that have been filed, will be threshold objections. They'll be effective. And they'll take the total number of claims way, way, down. Other objections, which we'll talk about, will reduce them further. In the estimation phase one, this maybe is actually optimistic. We think that there

are going to be even fewer cases that are left. But certainly an order on magnitude or better than what we've got with 4,000 cases, which then leaves us only with a small number of cases, we hope and believe, that actually have to be valued. That is, actually have to be estimated in all respects. So, that is the step-wise approach that we're pursuing.

Now, we did have a productive dialogue. We had Mr. Baena, on behalf of his committee, was very diligent in pushing to have several discussions, both oral and in person, so we hashed out all aspects of this. I frankly thought that we came an awful lot closer than what the papers seem to reflect, but it is what it is. We don't have an agreement so we're here today. And essentially, as I read the papers and I see the alterative that's been proposed, the committee doesn't like any one of the phases that we've got, and doesn't even like the fact that we've got phases, don't see the need to have the gateway and authority objections addressed first and promptly. Why don't they just simply go on their merry way? On estimation, don't believe that that's a common issue. It can't be adjudicated as a common issue. And with respect to phase two, that is the final step, they even take issue with what I, I believe, a fundamental precept of the Code, which is that estimation can, in fact, be used to set the value of each and every claim if that's where this thing goes.

Now, obviously the number one priority it to set the

overall aggregate value, because that is what is called out in the plan. But given estimation, and the fact that there's no personal injury claim, 502(c) is loud and clear, we can use estimation, following the appropriate rules of evidence, to value out each and every one of these claims. We think at the end of the day that's going to be very feasible to accomplish. They take issue with that, as well. It is perplexing why. I am sure that Mr. Baena will explain that here this morning.

So, we have to respond to these various points that have been made, and I will try to do so briefly. With regard to the objection process, the objection process already, even at this stage, has borne very significant proof. There were early flags, and we started to look at the claim forms that were turned in with respect to these property damage claims, there were early flags that there were fundamental problems, that the 4,000 claims really were not real. What kinds of flags? Well, in some cases, in many cases, indeed, in scores if not hundreds of cases, we had a claim that said the claimant is a building. Now, I guess in an in rem action the action is all about a thing. But generally plaintiffs are people, persons, corporate persons, or individual persons. They're not buildings. Why is a claim being filed on behalf of a building? We had another early flag, which was, it turns out, that not only were the claimants structures instead of people, but the claimants, I guess a building can't sign a claim form, so the

lawyer has signed all the claim forms -- 2,938 Speights and Runyan claims were signed by one of two lawyers, either Mr. Speights or Ms. Steinmeyer. And we can see this very easily. It's right on the claim form itself. Speights and Runyan.

THE COURT: Well, I mean, with respect to that objection, why don't you just file it?

MR. BERNICK: I'm sorry?

THE COURT: With respect to that objection, why don't you just file it? Let's just get to that issue.

MR. BERNICK: We have. We --

THE COURT: Oh, it has been filed?

MR. BERNICK: We're going to -- we have filed -- we are filing, I believe today, all of the objections based upon personal authority with respect to all the Speights and Runyan claims.

THE COURT: Okay. I'm not sure why that's going to tie up anything else.

MR. BERNICK: It's not -- it shouldn't. That's the whole point, is to get rid of this stuff early on.

THE COURT: Well --

MR. BERNICK: And you'll see that there are some issues that do have to be adjudicated. But what we found out was that, take this particular claim on behalf of the AMA, we started to test this. We subpoenaed ten different buildings, and this is going to get back to the question of timing, which

is very deep. We subpoenaed ten actual claimants that were listed to have them talk about, tell us where is the authority that they gave to Mr. Speights. And what we found out is that it was represented that in the case -- this one right here, actually, signed by Ms. Steinmeyer, that the AMA actually had authorized them to proofs of the claim. But we have now obtained an affidavit that actually says that the people from the AMA actually spoke with the Speights and Runyan firm on discussions whether S&R would represent the AMA in this proceeding. I informed S&R that the AMA did not wish S&R to represent them in this proceeding.

THE COURT: Well, I mean, this is going to be a major litigation issue, because frankly, if that law firm, in fact, filed a claim after getting notice that they were not to file it, that's cause for disbarment. I mean, that's not just a proof of claim issue. There's a real problem. So, why don't we just file it and get to it. If it's not true, then it's not true. If it is, then --

MR. BERNICK: That's exactly right. We then turn out -- I won't bore the Court, but we've got other communications from other people saying that it's not been authorized. So, in pursuing this with Mr. Speights, one of his answers was, and this is, again, a remarkable answer, it's what I call the road class. And there's no other way to refer to it. There was an effort called the Anderson Memorial class action, and this was

prosecuted as a purported class action on behalf of property damage claimants as a class. There's only one problem. It was -- certification was denied. Flatly denied. So, time passed, and rumors started to fly around that Grace was going to go into bankruptcy. So, all of a sudden a new class action is filed, and the idea -- in the action, this was explicit with the Court, is that Judge, you've got to certify this class and certify it now, because Grace is going to file for bankruptcy, essentially let's get our foot in the door. Well, that was not acted on until after the bankruptcy case was filed and the stay was put in place. So, we now have a class that apparently was certified after this case was filed, and they now say, well, that class action is there. Now, they could have been candid with the Court. They could have come in and sough permission to proceed in that class in terms of filing the claim forms. They could have sought permission to file a class action claim form. But what they decided to do instead was different. They rounded up all of the different people that have now been prosecuting -- on whose behalf they purport to prosecute, a total of about 1,600 claimants that they say, well, we didn't have express authority for all of them, but they're all part of this class. So, what we really have in the Anderson case, and the reason that I go through this, is that it's -- a lot of this stuff is very straightforward, but in other areas it's taking a little bit of time to unpack what actually has driven

this enormous volume of claims. And the Anderson case is outrageous. There are actual rules -- and to say, oh, well, because of that class I don't have to tell anybody, and I can presume to represent people even where I've called them up and they've told me no.

So, what have we done, and why is timing so critical? We've pursued this very actively in the last several weeks in order to get this process underway and to get this case down to a manageable size. This was taking place. We objected to ten of the claims and we noticed depositions of those people. Immediately there was a request to have a meet and confer to stop the depositions, so we said, well, here is the discovery we're going to seek from your firm, and in the meet and confer we also proposed a stipulation to moot the depositions. Just tell us that you never have represented -- never have been authorized by these people. Mr. Speights told us, in no uncertain terms, that stipulation was dead on arrival, wasn't even going to consider it. So, we had no choice but to proceed with the depositions. We then -- they then filed a motion for protective order and we actually, on an emergency basis, we're going to tee it up for decision today.

Now, all of a sudden what happens? There's another request for a meet and confer. A meet and confer now takes place, and now we get a signed stipulation. It's a little bit more detailed. It lays out more facts. It contains some self-

serving language. But in essence it says exactly the same thing, which is in virtually all the cases there's absolutely no authority for them to proceed. So, that mooted the issue, which means we can't actually get on track to resolve the question of what discovery we're going to get from Mr. Stipes's firm. All we want is the documentation with respect to all these claims. So, it's now being pushed off, pushed off, pushed off. And it's this lesson that makes us very, very focused on the idea of the CMO calling out for dates so that all of these matters can get resolved. We don't have to have kind of a little separate case management process with Mr. Speights. It's got to get done soon. And that's end of speech, but that's why I'm pursuing this --

THE COURT: Well, I got lost somewhere in this process because I'm still not sure where we're going. If this all relates to the objection that you're filing with respect to Speights' authority, I don't need to hear any more about it today. I have to adjudicate it in the context of that proceeding. As far as the property damages, the committee is concerned that somehow this process is going to tie up the rest of the process. I don't think that they have to be intangent. I think they can be in tandem while these processes are going on.

MR. BERNICK: That's not -- that's not -- it seems to me --

MR. BAENA: Your Honor, if I may? Your Honor, we --

MR. BERNICK: Just -- just a moment.

THE CLERK: State your name?

MR. BAENA: My name is Scott Baena on behalf of --

THE COURT: Mr. Baena?

MR. BAENA: Your Honor, we haven't even alluded to them, the Speights and Runyan claims in our papers in response to the CMO. It's background noise, Judge, and it's just like their process. They want to infect the Court by giving you a little bit of a preview of what they intend to do, what they haven't done for three years, four years. And it's irrelevant to the estimation process.

THE COURT: Well, look. Everybody -- let's start with one ground rule. I don't care what nobody has done up until now. What I care about is what happens from today going forward. So, the fact that it hasn't been done so far is a total irrelevancy. I don't care. The reason we're here and the reason I sent you out for the meet and confer was so that we could set a process going forward. So, the fact that it hasn't been done to date, I don't care about -- it's not any basis for any rulings that you're going to get from me today. What I care about is how we're going to get these things adjudicated in a logical and hopefully expeditious manner going forward, starting today. End of story. So, I don't want to hear any more from anybody else about it hasn't been done for

three or four years. It's irrelevant. It's going to be done now, and the question is how.

MR. BAENA: Correct, Your Honor. And I thought the issue we were here on is how are we going to estimate property damage claims generally, not how are we going to deal with Mr. Speights's proofs of claims.

THE COURT: Well, and I think -- well, we have to deal with all of the objections that any party intends to bring --

MR. BAENA: Clearly.

THE COURT: -- with the debtor in the lead, so -- I've already said, if the debtor is filing the Speights objections, let's figure out a track to put the Speights objections on and let's go with them. But I don't see why that has to go first. I don't see why the rest of the process can't go on while Speights is going on separately.

MR. BERNICK: It will.

THE COURT: Okay.

MR. BERNICK: It absolutely will. But the purpose of the CMO being staged in the way in which it is is that, for example, if we wanted to go right to constructive notice and the Daubert issue, that takes time for people to file their reports. So, the CMO calls out all of that. But in the meantime, we want to make sure that these threshold issues get addressed in a timely fashion. We originally wanted to include

them in the same CMO, so it would be clear that this kind of messing around with dates and the like, and not getting prompt adjudications isn't going to take place. Mr. Baena objected to having it in the CMOI because he said, well, this relates to Mr. Speights, who although he says is background noise, is 75 percent of Mr. Baena's current constituency. So, we put in a separate case management order, and there is now a separate case management order before Your Honor, and that's the only reason I'm talking about it, is that we would like to get that order entered so that --

THE COURT: Is anybody objecting to the separate case management order with respect to dealing with the Speights claims?

MR. BAENA: I don't believe they've even served it on Mr. Speights. Judge, I'm not here to represent an individual claimant. I'm not here to represent Mr. Speights, except to the extent that his claims are implicated in the P.D. estimation proceeding. I'm not in a position to sit here and talk about what the case management order ought to be in respect of the objection to any particular P.D. claim.

THE COURT: All right. Let me interrupt. Have you served this proposal on Mr. Speights?

MR. BERNICK: I believe that -- well, first of all, Mr. Speights is a member of the P.D. committee.

THE COURT: Yes.

MR. BERNICK: So, whether he was personally served, I don't know. I can certainly find out. But with all due respect, Your Honor -- Mr. Baena, we have gone through an exhaustive process of setting out dates for gateway objections. Gateway objections all relate to individual claims. The distinction that he's attempting to draw, which is I can't handle all these objections --

THE COURT: Well -- it's irrelevant. I mean, we have a property damage committee. To the extent they want to be involved they'll be involved. To the extent they don't, they won't, and then they'll waive any effort to get involved later. That's the way it's going to be. The property damage committee is there for the purpose of representing, in the global sense, all the property damage claims. So, to the extent they want to be involved, they will. If they don't want to be involved, they will have waived any opportunity to get involved. The case management orders are going to be entered, and they're binding on everybody, period, end of story.

MR. BERNICK: That's fine.

THE COURT: Now, with respect to Mr. Speights, if Mr. Speights is a member of the committee surely he must have knowledge of all this.

MR. BAENA: Judge, may I just make this point? The Court entered a case management order at the beginning of this case --

THE COURT: Yes.

MR. BAENA: -- about how matters would be brought on.

THE COURT: Yes.

MR. BAENA: This matter was not brought on until they filed a brief last week in respect of the P.D. estimation. That's the entire notice of this matter, which got it -- because they control the agenda on today's calendar.

THE COURT: They don't control the agenda. Anybody who wants to put anything on the agenda can be put on the agenda. And if, in fact --

MR. BAENA: Not on --

THE COURT: -- somebody is asking for something to be put on that isn't put on, please let me know --

MR. BAENA: No, no --

THE COURT: -- because I will withdraw all of the agendas and we'll do something different.

MR. BAENA: My point is your case management order doesn't permit a matter to be put on here, for hearing, on -- seven day's notice.

THE COURT: That's right.

MR. BAENA: And that's what's happened here.

THE COURT: Well, then, if we're not ready for it, we'll put this on to August. Mr. Speights can get notice. We are going to deal with Mr. Speights' claims.

MR. BAENA: That's fine.

THE COURT: These are serious issues.

MR. BAENA: I'm not telling --

THE COURT: And they ought to be litigated one way or another.

MR. BERNICK: Your Honor, really, this is -- this is so -- this is so disingenuous. Mr. Speights clearly knows, he's clearly a member of the committee.

THE COURT: Look --

MR. BERNICK: This whole -- I'm --

THE COURT: No, wait. I'm going to resolve this. I've heard enough. I'm going to enter a CMO that deals with Mr. Speights' claims. If, in fact, Mr. Speights, who apparently is the entity who will be most interested in this, has some objection and hasn't been appropriately notified, he'll let me know and then we'll put it on the August agenda. So, my suggestion, Mr. Bernick, to the extent that the CMO is an issue is simply that we enter the order but we make the dates start one day after next month. And then if Mr. Speights wants to be here, he better be here next month, because that's when this issue is getting put to bed.

MR. BERNICK: So we can then pursue with others, because I don't want to hear the same objection with respect to others. How -- does Your Honor want us to serve every single P.D. claimant with that same -- with that same case --

THE COURT: No. I don't know that that's necessary.

But when you're dealing with 75 percent of the objections and the whole issue seems to be focused, in many of them, if not most of -- if not all of them, on the authority of the person who signed the claim on behalf of the claimant. That person ought to be notified.

MR. BERNICK: That's fair enough. But then let's build on, because what we have said is that by September 1 we're going to file omnibus objections that kick off what used to be called all the gateway objections, substantially incomplete form, insufficient supporting -- no product I.D. We have a lot of them that weren't identified what the building is, barred by the statute of limitations. I want to come back to the statute of repose prior settlements. These are all threshold matters that pertain to actual specific individual claimants. And --

THE COURT: Well, you'll need to notify those specific claimants when you file the objection.

MR. BERNICK: Okay. Well, the -- well, that's fine. We will certainly go ahead and do that. But all that I'm underscoring to Your Honor is that at some point we've got to be able to manage this case. And --

THE COURT: Yes, you do. But --

MR. BERNICK: And if Mr. Baena can't communicate with his own clients, or his own -- his own constituency --

THE COURT: Now stop, folks, please. We're not going

there. Please. To the extent that there is an individual claim as to which the debtor is going to file an objection, the property damage committee, in fact, all of the committees, because they're part of the service list in the case, so they should get notified, the lawyer representing that entity, to the extent that there is a lawyer who is representing that entity, and the claimant should be notified. If the claimant is a building, then frankly I don't know how you serve a building unless you have to go post it. I -- it would seem that if Mr. Speights's firm filed those objections on behalf of the building, notifying Mr. Speights ought to be sufficient because I don't think posting a notice on the building is really going to give that building any better notice than giving it to Mr. Speights.

MR. BERNICK: That's fine, Your Honor. We'll proceed in accordance with that. And, Your Honor, we will ask for the CMO to be entered. We'll modify it so that it's effective the day after. Whatever it is, we just want to get the ball rolling because we think it will save a lot of time.

Let me pursue estimation phase one, which is the next one. And this, again, will be -- I'll attempt to be brief here. There are two issues. One is the proper methodology for determining whether a product is a hazard necessitating removal. The essential position, and it's been litigated again and again, and with mixed results. They talk about, and we'll

show here in a moment, that there are some cases that have decided this against us. There are cases that have decided this in our favor. There's a Judge who wrote a 180 bench opinion going through and finding that this product was not a hazardous product. So, there's a very hotly contested issue about whether, once the product is in place, and it's not disturbed, whether there -- whether it's really a hazard necessitating removal. Of course, these days maintenance people know the kinds of cautions to take. You don't have to spend tens of millions of dollars renovating a building just because there's asbestos there.

Well, the first issue has really got two parts to it. The first part is methodology, that is what kind of data can be considered in determining whether there is a risk necessitating removal. The second issue is if the data has been properly obtained, what does that data show? Does it show that this asbestos-containing product in place actually gives rise to a risk sufficient to warrant removal? So, there are really two parts to it, and we have constructive notice.

Now, there's some complaint here that in some fashion this is a big surprise. It's not a big surprise. November 9 of 2001, we -- our consolidated reply in support of our motion for a case management order, and we specifically addressed the question of what would actually take place. And we specifically identified this whole area of risk as a major

issue. Why? Because it was a major issue in the underlying litigation. So, there's absolutely no surprise here. In fact, the day that the case -- we learned the case was going to be transferred, I was prepared to come in and argue this very point, including some of the very graphics that we have here, before Judge Farnan. So, this is not new. It's been out there absolutely forever. Now, in the case -- the Daubert issue, is a threshold issue. If a building does not have the proper data following scientific methodology, that claim is history. They cannot meet their burden of establishing that there is any risk. So, the data -- the question of data is a threshold issue. We're now in Federal Court, Daubert most plainly applies. There's some issue that the P.I. Committee has raised with respect to that, but the Bankruptcy Rules spell out, in a contested proceeding the Federal Rules of Evidence govern. This Court is bound to follow Daubert.

THE COURT: If we need expert opinion testimony in this issue, and frankly I don't see how we can do it without it, yes, Daubert applies, as do the several cases that follow Daubert, Kumho Tire, for example, and the others, in the Supreme Court. So, yes, it applies.

MR. BERNICK: And basically Judge --

THE COURT: The only question is when to do the hearing.

MR. BERNICK: That's right. And this -- we

reasonably put this one up front. It's the basic question of whether an indirect measure, like dust, can get you up to the risk models that take you to the legal standard which requires risk. It's a very simple, straightforward issue in the sense that it took about a day or two of evidence to present. And the reason that we moved it up front is A, it's generic. We know from the claim form submissions, Your Honor, we know exactly which buildings have air data. You need air data to be able to measure risk in accordance with -- measure risk in accordance with the existing risk models. If you don't have air concentration data, you're not on the map to establish risk scientifically. And that was the issue that was presented. So, we know already exactly which claims, out of the thousands of claims, actually have gone to the trouble of gathering this very simple air data. And we know that very few of them have. There are probably a couple, three, four hundred buildings where this kind of air data even exists. So, it's a threshold issue. And once this issue was resolved in the Armstrong case, the property damage claims disappeared en masse. They were all settled. I won't get into the amounts. But the whole issue was resolved on the strength of having proceeded to get the determination that Judge Newsome made. That determination was very plain. He applied it across the board.

THE COURT: It was, but frankly I think I'm dealing with a different product under a different circumstance, and I

don't know whether dust -- because I haven't heard any expert testimony. I don't know whether using a dust standard in this case, dealing with different products than Judge Newsome addressed in Armstrong, is a viable standard. So, fine. If we need to figure out whether it's a viable standard then let's tee that issue up, because if it is then I'm going to hear the dust evidence. And if it isn't, then you're right, it ought to be stricken and we should move on.

MR. BERNICK: Right.

THE COURT: Frankly, I don't know why we can't do this trial with using both the dust data and using the air concentration data so that we can get it all in at one time. And if I determine that the dust data doesn't meet the applicable Daubert standards, then I can throw it out.

MR. BERNICK: I think that, Your Honor, that could be done. That's the approach that says --

THE COURT: Because the approaches are not the same, are they?

MR. BERNICK: Well, no, because -- but here's the price that we're going to pay for that. It goes right back to the same basic flow of claims. Number one, the dust data, once you get into the analysis of the dust data, you're not talking about a small amount of evidence for the Court to consider. You're talking about a significant amount of evidence. It is -- it's gathered in each and every -- in many of these

buildings in different locations, and the expert is going to struggle with well, what does it all mean? So, you're not talking about chewing off a small amount of evidence, but more critically, you're not talking about dramatically preserving a population of claims where if you wait until the end, we're not only going to analyze the dust data for all those buildings, we're going to analyze the statute of limitations. We're going to analyze state of the art, we're going to analyze the dollar value of removal. That's the whole idea of the phrased approach.

THE COURT: But you're talking about doing the statute of limitations first. So if, in fact, the statute of limitations has barred the claim, you're never going to get into any kind of data, let alone dust data for those buildings.

MR. BERNICK: Well, this is how it works. We get the expert reports, under our proposal here, on October the 17th. We have the phase one hearing here. Now, we have to still proceed with the phase two expert reports, that's correct, but the phase two expert reports will analyze the claims, and you won't have to hear -- you won't have to have discovery on any of this stuff if we get this phase one hearing in place. What are the issues? There are two. One is constructive notice, and the other is this methodological issue. You're right, Your Honor. If you were to decide, based upon constructive notice at this early stage, that these claims are barred by the

statute of limitations, then we wouldn't even have to resolve that issue.

THE COURT: Right.

MR. BERNICK: But I don't want to force that -- I don't want to force that. I want to -- I thought we would group these two issues together, constructive notice, not actual notice. It's the generic issue, not the case-specific issue, so that Your Honor could rule either way up front. Now, we could always advance this and do the statute of limitations first. We're happy to do that, too.

THE COURT: Wasn't the statute of limitations issue, at least the way you framed it in the papers, it seems that it's going to be a question of law. I know the committee has some concern, and every state statute and the method by which constructive notice might apply may be different, but isn't that still going to be a legal -- a threshold legal issue?

MR. BERNICK: Well, we believe that it absolutely is. This is -- let me just pursue that for just a moment so it's all faced to us all on the table. On the statute of limitations, as I've indicated, we think that the market recognized de facto the running of the statute long ago. But the Prudential decision, Prudential v. Gypsum, really established, in a sense, the de jure principle that was really driving the marketplace. And it is a generic issue. The question is, well, as of 1981, what did the marketplace

actually know? And the marketplace, we believe, is quite clear, and the factors that were picked out in the Prudential case are all of them very well -- very easy to establish. So, we believe that these facts that drive constructive notice, even under their standard of constructive notice, are all generic, can all be determined exactly as they were in the Prudential case. And constructive notice, Your Honor -- and incidentally, the Prudential case was affirmed by the Third Circuit. Constructive notice is a principle that is adopted in key states here. 60 percent of the 3,500 claims come from states that recognize constructive notice. So, we now come back. In phase one the whole idea is before we litigate every single building, you wash out the ones that you could object to, as we've talked about. We then tee up two issues. One is the scientific methodological issue, and the other is constructive notice. Constructive notice can be presented to the Court in a very, very short fashion. There's probably some expert testimony that would be required, but basically Your Honor is construing the facts about what was available publicly in asking the same question that was asked in the Prudential case, which is would this have put a reasonable -- would this have put a building owner on reasonable notice, inquiry notice of the fact that there was a claim? But we put both of those things before Your Honor. We have a couple day hearing on the Daubert issue. We have probably briefs with respect to

constructive notice. You've got it all there. And rather than holding off on those decisions until we analyze and then litigate all of the claims, if Your Honor would then determine those two issues, we will have this case down to what it really should be, which is the continuation of the pre-bankruptcy litigation flow, which was very, very small.

Now, we don't -- obviously, as we go forward we could present all this and then hold it all off until the end. And that's essentially what the property damage committee advocates. They say, well, why do all of this now. Let's just do it later. And the answer is so clear, because you're talking about a relatively small collection of evidence. It's already been litigated before in these cases, with decisive results, and it gets presented early on. And then if Your Honor gives us some guidance, we're in a position to then do the more labor intensive work on specific collections of buildings in a very, very efficient fashion as the last phase of the case. So, it really, in our view, is -- I mean, it's the way that you would proceed if you had Rule 16 really meaning something, which is how do you deal with 4,000? Well, you don't wait until the end to litigate all 4,000 claims if there are simple ways in which to chop down the population and focus on what's real. We'd feel differently about it if there had been -- if a different -- if there had been a different pre-bankruptcy history. If there were 4,000 cases out there

before the bankruptcy was filed and they call carried through, well, we could understand that. At least these are people who decided to file and prosecute their claims. Here we have seven cases turning into 4,000. There's obviously a problem that has to be resolved.

Let me touch a little bit on phase three, and then I want to talk about ZAI, and then I'll sit down so tat Mr. Baena can speak his piece as well.

The phase three estimation is relatively straightforward. First we take on the second prong of the hazard issue, which is, well, if there is air data, does it show that there's a problem? There are then a whole series of other issues. If there are -- if Your Honor rules against us on constructive notice, then we'll have to get into an actual notice standard. Now, we have evidence form the files already that bears upon actual notice. For example, we could tell you the State of California, which was responsible for several hundred claims in this case, actually litigated against Grace on asbestos in Alabama in 1990. They tried, together with other states, to get original jurisdiction for some kind of fancy case, all-in case against Grace, and it got thrown out. Here they are, in 1990, suing Grace. Well, if they were suing Grace in 1990, how in the world can their claims not be barred? So, we will have some case-specific statute of limitations issues. And then we get, obviously, to the question of

dollars. Now, on hazard the only thing that I will show beyond what we've talked about so far is that when you actually get to the air data, we now have got summaries that have been done, really with air data taken from buildings all over the country. And you can see here there's an OSHA action level of .1 fibers per milliliter of air. These are fibers greater than five microns. And you can see, if you aggregate the data from schools, public buildings, universities, commercial properties and residential, this is what your air data shows. It shows, you know, vanishing fractions of that action level. So, the question about whether this asbestos in place needs to be removed is very much a live issue, and we're here under Daubert. And if that constitutes an unreasonable risk under methodologies that are available to the scientific community in the risk models, then we lose. But if, under the methodologies that are in those models, these are -- these are background levels of risk, asbestos is everywhere, these are background levels of risk, then we win. And it's not a question of displacing state law at all, it's a question of applying state law at the federal standards of evidence.

So, we come back to the P.D.'s three principal objections. First, they say, well, there's no real need to do the gateway objections. Your Honor has already heard this. We're very focused on timing there. We've got to get it out of the way. Estimation, phase one. They say constructive notice

has been adopted in key -- we say adopted in key jurisdictions, and everybody includes common evidence, this issue needs to be addressed in any event, regardless of variations in state law. That remains true. Your Honor has raised the question can you wait? We've pointed out the tremendous efficiencies that accrue from not waiting. And then, with respect to the methodological issue, they say, again, that's not generic. Armstrong says that they're flat wrong about that. And then finally, with respect to phase two, they again say, well, gee, you know, we shouldn't be litigating the merits of these claims. That's exactly what estimation was supposed to accomplish in bankruptcy.

Now, on ZAI, we -- and this is something that I am proposing today. I've mentioned it to Mr. Baena before. But because this has been so heavily litigated already, we think it's very important to get on the table. And the question is this. Your Honor will recall that back in 2001 we get a notice program, we had a claim form, and we had a proposal for a bar date. We then -- they had a series of very vigorous discussions before the Court, and I remember them well. Should there be a class action for ZAI, or should there be a bar date? And, Your Honor, in a very practical fashion, said at that point in time, said, well, geez, don't I really have to know more about the nature of this product and what it's risks are before I can resolve that issue? If there really isn't a risk,

this product, why do I want to send out a nationwide notice? And why do I want to go to the trouble of having a bar date? Why have all these people file their claims to no purpose? So, we went down the road of doing te science trial, and the science litigation proceeded, very ably presented and litigated. And the matter is now under submission to Your Honor. Now, we would obviously like, if Your Honor were to rule, and dispense with the entire litigation. And that is, obviously, an alternative that's available. But given the time pressure that we're facing of the estimation process in the case as a whole, we think it's appropriate that we at least establish a track for ZAI in the event that Your Honor doesn't rule. Or, in the event that Your Honor rules and says that these claims in some part can continue.

We then get back to the question of, well, how do we deal with the people who are out there? Number one, we desperately need to know who it is that's going to file a claim, because if we don't know who those people actually are, folks will get in here and take the stand, and they'll engage in massive speculation about how many people there really are out there. There will be ranges from millions down to hundreds of thousands of people, and in order to do the estimation folks will take the assumed number of homes and simply multiply it by costs of removal, will have theoretically speculatively billions of dollars worth of claims. Mr. Lockwood ably put it

at the very beginning of the litigation, when he was -- he was very taken with these claims, not because they are meritorious. I think he would tell you that they're not. But with the problem that it's created is this is a 600 pound gorilla in the courtroom. We go back to the question, then, how do we find out who is out there? And I think where -- the Court probably has come to something like this. Before there was a missing piece of the equation. You know, is this so hazardous that people can't even go up to their attics and poke around, and look to see if they have it in response to a bar date notice. I think Your Honor knows, based upon the submissions that have taken place, that the prospect that people are going to be at risk if they poke around in their attics and see if they've got the stuff is completely without any kind of foundation. It is extreme and it's wrong. So, we do -- we have successfully, by presenting the science evidence on both sides, we believe, addressed the question about whether there is a barrier to their being a bar date. We think that there is no barrier to there being a bar date.

We then have before Your Honor the notice program, and they presented absolutely no alternative notice program. We have the claim form. And the only differences they had on the claim form were how do you describe, you know, the nature of this material and whether it's risky or not. So, we have, basically, a notice program that can proceed. We have a claim

form that can be used. All we need to do is set the bar date. And what we've proposed in very simple terms is that we simply do that on a time table that we've set out and we can actually have this same matter heard on exactly the same time table, and indeed in the same hearing. That is to say that if we send the -- if we send the notice out now we can get all these materials back. We can find out who the claiming population is. Your Honor already has seen most of the scientific evidence, if not all of the scientific evidence. And Your Honor can determine if this is real, and if so, what provision should be made for it in the context of exactly the same estimation hearing. So, we're prepared to proceed either way. We'd be happy if Your Honor would rule. At the same time we recognize the burdens that are on the Court, and we think that it's important to find out, once and for all, who these folks really are.

Now, I have some comments with respect to the property damage committee's proposed CMO. The biggest problem we have is that most of it we had never seen before. We had extensive meet and confers and they didn't tell us about a lot of this stuff. Rather than my anticipating that, maybe it would be appropriate to hear from Mr. Baena, and then I can comment on the CMO that he is proposing in the context of any response.

THE COURT: All right.

(Pause)

THE COURT: You can pull that tray out, Mr. Baena.

MR. BAENA: Oh. I think you tell me that every time. Thank you. May it please the Court, Your Honor, Scott Baena on behalf of the property damage committee. First, although it's been alluded to, I did want to assure the Court that there have been meetings in earnest in a good faith effort to come to an agreement about how to proceed. And I want to emphasize the fact that we met three times, two times telephonically, one time in person. And I do want to emphasize the fact that the issue that was discussed in the course of all of those meetings was not whether we were going to have a P.D. estimation, it was how we were going to have it. And we did, indeed, work with the concepts that were first promoted by the debtor as their vision of how to proceed. And what their process entails is a fundamental difference between the P.D. committee's view of what should occur here and their own. And it's on several different levels.

First and foremost, Judge, we see a very big difference between the process of claims administration and the process of determining, by estimation, the value of property damage claims. There have been at least one occasion where this Court entered an order which dealt with the issue of how are we going to expedite, to some extent, truncate to another extent, the determination of property damage claims. And that was the gateway objection motion that the debtor brought before

you. They sought an opportunity to tee up five different types of issues which they perceived from the proof of claim form that was approved by the Court as being issues which, if addressed by the Court initially, might avert the necessity for the substantive determination of each and every one of those claims. And the Court acceded to that process. Unfortunately, the debtor hasn't undertaken any gateway objections as of this moment, and so we don't know how well the process is going to work. But you will recall that that gateway process, amongst other things, included the determination of statute of limitations issues. If the debtor failed to convince the Court that any of those gateway issues should result in the disallowance of a particular claim, then they were forced to either abandon the objections or bring a substantive objection. And that was the gateway process. And we recognized that the gateway process was something separate and apart from the estimation of claims. And in the perfect world, Judge, the estimation process would be a process that put a value on all the claims that survive an objection process.

You cautioned everybody not to talk about what didn't occur here. I'm going to resist a little bit just to make the one point that this would be an entirely different process today, it would be an entirely simpler process today if there was any claims administration that had gone on in respect to P.D. claims in the last four years. But because there wasn't

doesn't mean that there's now an invitation to just blur the process of the determination of individual property damage claims and the estimation of property damage claims in the aggregate. And that is fundamentally our problem with the proposed CMO. It blurs the distinction between that which we think needs to be addressed in respect to specific P.D. claims with the process of an aggregate estimation of all P.d. claims.

We don't have to determine why we're at this point, but we do know, from our bankruptcy experience outside of the asbestos bankruptcy cases that estimation works best when the universe of claims to be estimated is at a minimum. Indeed, Your Honor, the real problem with the whole process that we've been disturbed by is the fact that it's become the law of the asbestos bankruptcy cases that we're going to estimate claims, and we're going to do so under 502(c). But what we have built up is an entire repertoire of experience in that regard in respect to personal injury but none in respect to property damage, making this job even more difficult.

And it's important to note that the code doesn't provide us any guidelines whatsoever under 502(c). Indeed, it addresses, when literally -- when we read it literally, the estimation of a single claim for purposes of allowance. And that's not what we're doing here. We're not doing a single claim, and we're not estimating the claim for purposes of allowance. That was your ruling in January. So, we're really

painting on a clean canvas, as I've said over and over again. And what the debtor is doing is taking advantage of that fact and just blurring the distinctions, once again, between 502(c) and the ordinary process under 502(a) of allowing or disallowing claims. And so --

THE COURT: We need to ask -- if we need to look at each individual property damage claim on its own, why do I need a committee? What does a committee do?

MR. BAENA: I'm not saying you do, Judge. I'm not saying that at all. Indeed, I'm saying entirely the opposite. One of the reasons why all of this is sort of unusual and difficult to accommodate is because we -- we promote the notion that all asbestos claims, at the end of the day, won't even be determined by the Court. It will be determined by a trust of some sort, a mechanism of the 524(g) for determining those claims, which is yet another reason why 502(c) really probably wasn't even contemplated in the context of 524(g). But I'm not saying, Judge, you have to do all 4,000 claims. To the contrary. Those claims will be determined elsewhere. Ideally it would have been determined before, but it wasn't.

The debtors, by the way, don't give up the prospect, as you've heard over and over again, of bringing claims to you in large numbers to determine. That's not the process that we've been suggesting should take place. And it's these overarching differences between us that really suggest the

differences in the approach. They view, as an example, the Speights and Runyan situation as a stage in the estimation. That, to me, in the best case, is just another way of saying the more we reduce the number of claims the easier the estimation process will be. But that's not to suggest that dealing with the Speights and Runyan claims is part and parcel of an estimation process. And we've got to keep that in mind. When they raise the so-called threshold issues, the phase one portion of their process, they seem to suggest, once again, that that's all part and parcel of an estimation process. That's where we disagree with them, and I'll get into that a little bit more.

So, Your Honor, we see this as parallel paths. You talked about it operating in tandem. I'll accept that characterization. But they are two different processes. And what's particularly important to keep in mind is that not only are the processes different, but the parties are different. That's an entirely different setting that we find ourselves in because in the case of individual claims obviously the claimants are implicated in that process. Obviously the claimants will come forward with evidence specific to their own claims. Obviously we're not in a position, as a committee, even if lots of those claimants are on our committee, we're not vested with the authority. We don't have the ability to represent individual claimants in the promotion of their

claims. On the other hand, on the estimation side of this equation, we are very much in the hunt. We have been designated by the Court as lead counsel in the case of my firm to prosecute, or defend, or whatever it is we're doing in the context of the property damage claims estimation process, and so, we've got to be very cautious in this process not only to avoid the blurring of the distinctions between claims administration and claims estimation, but to also remember burdens of proof and who is best able to manage the dispute that they wish to put before you. And when we get to our proposal you'll see, Judge, it's just what they would call phase three. It's an estimation process. It's a process, however, that's intended to provide different entry points for data that is obtained on the other side of the fence from the claims allowance process. The claims allowance process must inform the estimation process. We recognize that, and that's what our process does that theirs doesn't. Indeed, and I'll talk again about this in greater detail, their process doesn't even contemplate that you'll hear the threshold issues before experts have to provide their opinions about the value of property damage claims. There's no better dramatic testimony to the fact that their process can't work. Their process is just a lot of work to create a lot of confusion. And Mr. Bernick has explained why. He said it subtly and not to subtly repeatedly. It's because they want to create a delta for a

settlement. Well, hopefully that prospect does exist. Hopefully that event will occur. But we don't build the estimation process, in all due respect, Your Honor, to find that delta. We're still undertaking, if we accept their view of it, we're undertaking a Bankruptcy Code process. The process doesn't talk about creating deltas for settlements. It talks about estimating the value of the remaining claims. And so, that's what our process is intended to do.

The requirement that we --I'm sorry -- the requirement that we build into all of this flexibility can't be overstated. And I think there are current examples that are, again, dramatic proof of why that's the case. Judge, just as it is the case that none of us have ever done this before, every other instance where there is a price tag put on property damage, it was done by consent. It was done by agreement to the parties. It was done in the context of a consensual plan of reorganization. So, this has never been done. And as a result, I couldn't begin to describe to you today, Judge, and assure you that I wouldn't have to change my position later, how exactly estimators are going to go about putting a number on, and how we're going to present that evidence to you, and what rules of determination you need to abide by in making an estimation, because to a large extent we're going to be creating that process as we go along. We heard, several months ago, and you'll recall what derailed the approval of a case

management order was a couple of revelations that came along the way in the course of mere conversation in meet and confers with the debtor. We heard that now science was on the table again. There was no real definition to what kind of science we were dealing with. Indeed, you'll recall Ms. Baer asked the Court for time out so she could meet with their property damage experts. We cannot construct the process, Judge, in the void of experience that we have that doesn't permit them to say, gee, we may need to bring up science, and for us to be able to react to it. If we didn't fortuitously find out about that, we could have been in a very serious and embarrassing situation, causing a do over at the end of the day. And their proposal provides no opportunity for either side to present a vision, and for the other side to accommodate it or oppose it, and for Your Honor to decide whether it should be incorporated in the process or not. Ours does.

The most telling part of their position is in their papers, because, Judge, everything I say is borne out by their moving papers. They are looking to use this process to filter out claims. And we've just got to stop for a second, Judge, and say to ourselves, is that what an estimation is supposed to do?

THE COURT: Look, I mean, if the issue is wordsmithing, that for example, just to pick a group of claims, that the debtors' objection to the Speights claim is really a

substantive objection on allowance issues because of the theory that the debtor had expressed here today and in its papers that there was no authority for the filing of the claim at the outset, that's fine. I mean, it's not really estimating the claim. It's either allowing or disallowing the claim. If it's disallowed there's no need to estimate. If it's allowed, then it goes into the estimation pool.

MR. BAENA: Correct.

THE COURT: Okay?

MR. BAENA: Correct.

THE COURT: So, we're not saying anything -- I don't think you're saying anything any different, you're just using different words for that part of this.

MR. BAENA: Well, I don't think so, Judge. I think, in all due respect, I appreciate the fact that that's how you hear it, and I don't want to discourage you from hearing it that way, but that's not what they're saying. That's not what they're saying. They're saying we can get rid of lots of claims in the course of this process.

THE COURT: Well, maybe they can. I don't know, at this point. Maybe they are --

MR. BAENA: Not when you're doing an estimation for purposes of feasibility. And, Judge, this is a very important point, very important point.

THE COURT: But taking a look at the -- again, just

to use this as an example, at the Speights claim, in the manner in which the debtor says it's going to pursue the Speights claim isn't estimating it. It's determining whether it's a properly-filed proof of claim that can be allowed or not allowed.

MR. BAENA: Right. I agree with that. I agree.

THE COURT: All right.

MR. BAENA: I agree with that example, but if we use the constructive notice example --

THE COURT: Okay.

MR. BAENA: -- I don't agree that that's a determination that's appropriately made in the context of this proceeding, of the estimation proceeding.

THE COURT: Okay.

MR. BAENA: I don't believe that Prudential tells us that it should be. I don't believe state law supports that theory. And we're all in agreement, because now their papers even agree with us that state law is the determining factor as to whether or not these claims would have been allowed in the tort system. And so, we look to state law for guidance as to issues like statute of limitation, an issue which they previously characterized as a gateway objection, an issue which, because it is a gateway objection would be asserted against a claimant not in the context of an estimation.

THE COURT: And I agree with that. I believe that

the issue with respect to the way the debtor has structured the gateway objection process, their pre-phase one, or phase one process, is that there are requests for determinations of whether or not the claim is allowable, period. And if it's not allowable it goes away. It's disallowed and there is no estimation with respect to that claim. But if it is allowed, or allowable, then the value of that claim has to be estimated so that the debtor knows -- you folks all seem to think there's going to be a property damage trust, how much money is going to -- or something, is going to be required to fund that trust for purposes of distribution.

MR. BAENA: That's the point, Judge.

THE COURT: Okay.

MR. BAENA: How much money is going to be necessary to fund the trust? How much money has got to be allowed to asbestos claimants --

THE COURT: Right.

MR. BAENA: -- as opposed to equity? That's the issue here.

THE COURT: Well, as opposed to anybody else.

MR. BAENA: And, Judge, you see, it's just really a matter of perspective. Our perspective is that because this is a feasibility issue, not an allowance issue, which is what 502(c) talks about, and because we are trying to determine what would the contour be for the treatment, you know, dollar-wise

for the treatment of property damage claims, our position is that you want to know how bad it could get. They're trying to prove to you, through the estimation process, how good they might do.

THE COURT: Yes. And you'll try to prove how bad they can do, and hopefully I'll come to a decision, and that's how the estimation will go. That's what estimations always do.

MR. BAENA: But Judge, what is the purpose? The purpose is to find out how much money could conceivably need to be set aside because of --

THE COURT: Right.

MR. BAENA: -- the allowance and disallowance of claims.

THE COURT: Right.

MR. BAENA: Which is not happening here.

THE COURT: Why not?

MR. BAENA: Why not? Because the estimation proceeding doesn't deal with the allowance and disallowance of claims. The estimation proceeding doesn't.

THE COURT: Well, but it will.

MR. BAENA: They may bring objections to claims. That's a different proceeding. They may allow some claims to go to a trust to be allowed or disallowed. That's not implicating the estimation proceeding. What we need to determine is, at the end of the day, after they've finished

their objections, after the trust gets finished scrubbing the claims, how bad could it be, because we want to make sure that there's enough money to pay all the claims that could be allowed.

THE COURT: In -- at whatever distribution percentage the plan is going to -- or the trust is going to set, yes.

MR. BAENA: And the reason they're approaching it differently, Judge, goes back, once again, to the fact that they've done two very nasty things to us in the plan, their plan. The first is they put a cap on all asbestos liabilities. And the second is they've said nobody that holds an asbestos claim can vote. You see. And this process is to promote their plan.

THE COURT: Well, this process has to go forward regardless of whose plan is --

MR. BAENA: That is correct.

THE COURT: -- ever on the table. And the concept that the asbestos claimants are not going to get to vote is one I haven't yet been required to address. I will, I'm sure, be required to address that issue.

MR. BAENA: Well, Judge, it is because of that difference that we think that allowing the intrusion into the estimation process of matter which State Courts reserve for the determination of individual tort claims is inappropriate.

THE COURT: But how else do I estimate whether there

is an allowable claim that may be subject to payment through the trust? Because if I adopt your view and don't look at the constructive notice issues, then there is no estimation and I'll allow those claims at zero for purposes of estimation because I'll have no evidence that indicates that they are anything other than stale, because they're old. You know --

MR. BAENA: But you can't come to that conclusion, though, in the course of this.

THE COURT: I can't, unless I hear the evidence. Exactly.

MR. BAENA: But the evidence will show you that these claims were filed.

THE COURT: Yes.

MR. BAENA: That's what it will show you.

THE COURT: They were filed.

MR. BAENA: There's an objection process that's going along in tandem.

THE COURT: Right.

MR. BAENA: It's claims are getting allowed or disallowed in the course of that process.

THE COURT: Right.

MR. BAENA: That will inform us about the number of claims.

THE COURT: Right.

MR. BAENA: Okay. And so, that's the place where we

determine whether or not the claim is time barred or not, not here. You can't judge, you shouldn't judge, in all due respect, you shouldn't end up, at the end of the day, saying just what you just said. I think these claims are old, I'm going to put a zero value on these claims. It's not a binary decision. That's the problem here. It's not a binary decision.

THE COURT: Which is why --

MR. BAENA: Indeed, the problem -- the stark difference between estimating personal injury claims and property damage claims is I don't think Mr. Lockwood would tell you that statute of limitations is a big deal in that whole process.

THE COURT: That's because in every instance in which I've been involved so far the debtors have wanted to put even stale claims into the plan so that they don't have an issue about something coming back to haunt them later. They've never raised it, that's why it's not an issue.

MR. BAENA: Well --

THE COURT: In fact, I specifically raised it in one of the cases, in one of the Pittsburgh cases, and they said no, we don't want to go there, we want to put all the claims in, whether they're old or not old.

MR. BAENA: No, Judge, I -- respectfully --

THE COURT: The only entities who have been raising

it --

MR. BAENA: -- I think historically --

THE COURT: -- have been the insurance companies as to whether or not they're going to have liability in the event that the debtor pays the claims through the trust, which isn't something, fortunately, I've had to deal with.

MR. BAENA: Judge, I think historically it's just become the case that there isn't much attention paid to statute of limitations on the universe of claims that are being estimated for personal injury purposes.

THE COURT: Which is what I just said.

MR. BAENA: I agree with you. But it's an evolution that brings them to that point. Here, again, we have no prior experience, and here there is this appearance of old claims. And so, we're focused on it. And so, because of this need to get this process done, and again, forgive me, and because we haven't done any claims allowance --

THE COURT: But there's a big difference between the --

MR. BAENA: -- and disallowance before, we're --

THE COURT: No, Mr. Baena --

MR. BAENA: -- sort of now going to use the process of estimation --

THE COURT: No.

MR. BAENA: -- to --

THE COURT: I can't agree with that. Number one, there's a fundamental difference between the property damage and personal injury. The personal injury latency period might still be out there. The property damage is done. Nobody is putting asbestos into a building anymore. If it's been put into a building in 1973 and it's been there since 1973, we know that it's been there since 1973, and somebody is going to prove whether or not it's hazardous or not, and that can be estimated. The amount of the damage either to remove it or the likelihood that the building is going to have to be torn down at some point in the future, or whatever, can be known. It's much different than the personal injury side of things. And there is no reason why this estimation process can't work. This is just a claim, like everybody else's claim. It doesn't involve a personal injury with a latency period.

MR. BAENA: Judge, a couple of points in response. First of all, while it's not totally settled yet, my understanding was that in this particular case the estimation that the debtor has asked for is first in respect to filed claims. So, it's -- it's not the futures that you talk about people who may get sick in 40 years. Additionally, in regard to property damage claims, I think I've made this point before, but it appears to be worth making again. And that is the statute of limitations doesn't apply to all of these claims.

THE COURT: Why not?

MR. BAENA: Because of nolens tempus.

THE COURT: Well, okay. So, fine, that's going to be the defense to the objection to claim on constructive notice.

MR. BAENA: 1,600 claims that were filed --

THE COURT: Okay.

MR. BAENA: -- related to nolens tempus claims.

THE COURT: Oh. All right.

MR. BAENA: All right. So, I mean --

THE COURT: 1,600 claims is a drop in the bucket in these cases.

MR. BAENA: Well, Judge, you know, that's an interesting observation because if we were to believe everything that Mr. Bernick says, giving him just a little bit of time, he'll vet these claims down to a minuscule amount.

THE COURT: Well, he may or may not.

MR. BAENA: Which would make estimation a lot easier.

THE COURT: Yes, it will.

MR. BAENA: It would make it a lot easier --

THE COURT: I agree.

MR. BAENA: -- if he could do that first.

THE COURT: Yes, it will.

MR. BERNICK: That's what we're trying to do.

THE COURT: If the claims are not allowed, they can't be estimated -- there's no need to estimate them. They're not allowed, there's no claim anymore. So, of course what we want

to estimate is the universe of claims, not the universe of disallowed claims.

MR. BAENA: Correct. Correct.

THE COURT: Okay.

MR. BAENA: And it's the claims allowance process that gets us to that point.

THE COURT: I agree.

MR. BAENA: Judge, I was hoping I could use this thing, but I see it's not -- is it working. I just wanted to --

MR. BERNICK: Scott, if you really want to, I think we can help make that happen. Do you want to use it?

MR. BAENA: This thing?

THE COURT: Is it plugged in. I --

MR. BERNICK: It's the ELMO.

THE COURT: I have never tried to use it myself, so I apologize. I don't know. But it's -- if it's plugged in it should be working.

MR. BERNICK: No. The screens are already in place.

MR. BAENA: I just want to put a piece of paper on it. It's regular paper.

(Pause)

MR. BAENA: I'm not sure where it shows. Oh.

THE COURT: Oh. Wait -- okay. Wait until I get my screen adjusted. I'm sorry.

MR. BAENA: I'm sure there's something I have to do to adjust this.

MR. BERNICK: Now you know why I didn't want to use it.

MR. BAENA: Yes. You can't hardly see it. Judge, may I approach and hand you a copy of what I'm projecting?

THE COURT: Sure. Thank you. If you have an extra, Mr. Baena, would you give one to my law clerk, too, please? Thank you.

MR. BAENA: Judge, what we have, and maybe it will just be easier to work with what I've handed out instead of --

THE COURT: This is the chart that's in the book.

MR. BAENA: No, Judge. This is our chart.

THE COURT: No, it's different?

MR. BAENA: I haven't compared it to theirs because I just got theirs. And what we tried to portray here is the P.D. committee's proposal on the top, and the debtor's proposal on the bottom. And as I indicated before, Judge, our proposal really attempts to deal with what they call phase three, which is an estimation hearing. And we start with the proposition that to the extent that we can conform this process to something we're all familiar with, like a contested matter conducted when Rule 26 applies, it will be easier for the parties to pursue this process. And so, again, our process starts not dissimilarly from theirs, or excuse me, dissimilarly

from theirs, by having parties sort of like apprize one another, as we do in litigations, about the nature of their case.

THE COURT: That's fine. I don't have any problem with the structure the way you want to do it with respect to the -- what is the equivalent to the debtor's phase three.

MR. BAENA: And -- okay. So --

THE COURT: So, I don't have any problem with it.

MR. BAENA: Okay.

THE COURT: But that doesn't mean that I'm not going to permit the debtor to do the gateway type objections that it wants to go forward with.

MR. BAENA: I'm not stopping them, Judge. I --

THE COURT: Because I think it needs to.

MR. BAENA: Judge, I have obviously not articulated the committee's position will, and I --

THE COURT: Oh, yes you have.

MR. BAENA: -- want to take another shot at it, Judge. We have no problem with the gateway objection process. When Mr. Bernick and I met, I told them go object to claims. When he raised this new phase two, or phase one -- they call it phase one, their threshold issues, I said, do them. We're not trying to stop them from doing it, Judge. But we don't want to create this process that's compressed the way they do.

THE COURT: Okay.

MR. BAENA: And if they wish to bring that up along the way, they may do so, and we may object to it again. We may try to discourage the Court from pursuing it. And that's context in which it ought to come up.

THE COURT: Fine. The only issue --

MR. BAENA: In terms of the gateway objections, we have nothing on this paper about gateway objections. We have --

THE COURT: The only problem that I see, Mr. Baena, and frankly I see it in both of your proposals, is I'm not sure about the discovery -- the contours of the discovery with respect to the claims that the debtor may actually be filing what I will call a substantive objection to, something other than the estimation, more akin to the allowance or disallowance.

MR. BAENA: Judge, I would -- I'm not weighing in on that because it doesn't involve anybody but the claimant and them, and I would imagine that if that becomes a problem between them and the claimant they'll get a case management order.

THE COURT: Oh, no. I misled you with what I said. I'm sorry. I meant with respect to the phase three estimation, you're going to be doing discovery --

MR. BAENA: Correct.

THE COURT: -- while the debtor is going to be going

through the gateway objections. I am not certain, for example, you may want to take discovery of the Speights claims while the debtor is saying there aren't any Speights claims. And frankly, it would seem to make some sense, if the debtor has even a colorable objection that makes sense, that the discovery on those claims as to which the debtor has a substantive objection probably doesn't go forward until there's either an allowance or disallowance, because otherwise you may be spinning wheels. Having said that, however, if you don't go forward with it then, then you're going to delay discovery if, in fact, those claims are allowed. So, that's what I'm asking about. How do you want to resolve that issue?

MR. BAENA: I understand your point. And, Judge, all that I could figure out in that regard was to at least permit the process to accommodate a result in respect of those objections. And that's why we permit, under our proposal, the right for experts --

THE COURT: The supplementals.

MR. BAENA: -- to supplement their reports.

THE COURT: Okay. Fine.

MR. BAENA: I don't know how else to do it, Judge.

THE COURT: That's fine.

MR. BAENA: A few months ago, January 21, when I was complaining about, Judge, we don't know all about each of these claims, and those claimants aren't here, you did two things.

You said P.D. claimants can participate if they want. It's not mandatory. And then you said and you'll have the right to take discovery. And I accept that. I'm not sure, today, what discovery I'll wish to take. But that is an opportunity that we have. I think that the process, I think that the approach, firstly, that each side will take in respect to the process, which will be reflected in their initial designations, to a large extent, I believe, will, to a large extent, shape the contours of discovery. And we're just not at a point right now to tell you precisely what that would be. But I do believe our process accommodates it.

THE COURT: Okay. I don't see any problem with due process.

MR. BAENA: Okay. Would you like to sign our order, Judge, or --

THE COURT: Well, actually I think I want a combination of several orders. I mean, I think what I need, or if you're going to break down this CMO process with respect to what I'm calling the substantive objections as opposed to the phase three, then if you want it in one order I need a combined order.

MR. BAENA: I would prefer separate orders, Judge.

THE COURT: Well, let me hear from Mr. Bernick about -- I've just said I don't have a problem with your order. Let me find out what problems he has.

MR. BERNICK: Your Honor, if I could --

MR. BAENA: My stuff --

MR. BERNICK: Yes. Go ahead.

(Pause)

MR. BERNICK: Let me come back to a point that really goes to the extent to which these orders can be combined, and if you'll just bear with me for a second I want to wrap in what I think is the central point that Mr. Baena made, because it's still lurking out there, and I believe that unless it's squarely addressed it's going to be very difficult to even get down to the level of the orders, because it even potentially undercuts the orders. And that is if you think about a claim being filed called claim one, that claim is going to have different constituents. It's going to have a bankruptcy constituent in the sense that it has to be filed as a bankruptcy claim in accordance with the Bankruptcy Rules. It will have an evidentiary constituent. And we all know that under the Bankruptcy Code, the evidence that is followed, rules of evidence that are followed are the Federal Rules of Evidence. And then, finally, you have a legal component. And it's never been disputed, we know that the legal component is state law with respect to these tort claims. That's what a claim is, whether there are a 1,000, a 100,000, or there's only one, those are the constituent's claim. Now, the Code does set out, and as I see Mr. Lockwood with this kind of Cheshire grin,

remembering that all of these things all have been gone over in connection with P.I., and he's just to fascinated to see how are we going to maintain our position on P.I. and P.D. at the same time, but he also knows that it's there, and what it is. We do know that there is an objection process that can be pursued for that claim. That is a procedure that is available under the Code. And if we were to object to any one of the claims we could object on any one of these grounds. They would all be substantive objections. We can say that there was no authority, so we say under the Bankruptcy Rules you've got to have authority to file a claim, you have to do it in later litigation, too, but we can say that there's no authority, and that would be a substantive objection. We can say that there's no product I.D. That's another gateway objection. They just don't identify our product. That is actually a requirement of state substantive law. But it's also a substantive -- they say there's no product I.D. We could also object on grounds of statute of limitations. Indeed, the gateway objections also include the statute of limitations. We could also object on grounds of Daubert. In fact, in the Dow Corning case there were objections that were filed on Daubert grounds. Any bankruptcy law driven, evidentiary driven, or substantive legally driven objection can be made to any claim that is done on an individual basis, you will then get to the question of whether claims should be allowed or disallowed.

THE COURT: Right.

MR. BERNICK: The rules, then, are spelled out for that process. And basically it's a litigation process. There are some rules that don't apply, but basically the Court spells out which rules of civil procedure apply. We can go through each and every one of the claims on exactly this basis. And in fact, we will, in this case, be filing objections to each and every one of the property damage claims on each and every one of these grounds. It's not simply going to be limited to the Speights problem of authority. We're going to be making substantive objections to all these claims. So, issue will be joined on every single claim. And we could go down the road of doing the objection process. That's what we originally proposed for doing for the personal injury claims. It's what we've always said that we were going to do with respect to the property damage claims. So, there's no real distinction between an objection that's filed with respect to a claim in terms of what the grounds for objection can be, and anything else that you might -- all these objections are all substantive objections.

We also have the opportunity, though, under the Code, to go with estimation under 502(c). This is another procedure. Now, does the evidence change under 502(c)? No, the evidence doesn't change. 502(c) is an estimation. If it's contested, it's a contested matter. If it's a contested matter, exactly

the same rules apply. There's no difference. So, the objections that can be made to the allowance of a claim are substantively identical to the defenses that could be lodged in connection with an estimation. And the outcome of the estimation, Mr. Baena is hesitant to say that there is a -- it's not a question of binary. If the claim is no good, the value of that claim is zero. Now, there is no way to value that claim. It isn't driven by Bankruptcy Rules, the Rules of Evidence, or state substantive law. It's exactly the same. But what the Code contemplates is the 502(c), that is estimation is available, where to go through claim by claim. Or even a single claim. You could do 502(c) for a single claim. Where going through the single claim, following each and every one of the available procedures would be time consuming. So, for example, if there were one claim, and it were a horrifically complex property damage claim, Your Honor might decide, you know, this thing is so complicated, but you know what? It's only worth $10,000. If we went down the road of doing full-scale litigation for this claim we'd eat up all the costs -- we'd eat up the value of the claim in litigation. Let's just do an estimate. What would the estimate be? It's the same evidence, the same defenses. It's a streamlined form of it. You don't have to have witnesses take the stand under oath and follow through every single issue down to the last detail. You consider the basic issues. You save money, and

you save time. The only variance between estimation and full-scale litigation under the rules is that you have the option of not following through on all of the different rules of civil procedure that might otherwise apply to the allowance or disallowance of the claim. It is a streamlined process. If you take a look at the case law, the case law in estimation doesn't rise or fall with mass tort. They're all cases where a Judge says, well, we're going to estimate this. You all come in. We're going to have a mini trial. That's basically what is all involved. Okay. So, the outcome is driven by the same defenses, the same evidence. Mr. Baena is anxious to avoid having all the same issues arise like messy statute of limitations, and messy Daubert. They're here no matter what happens. So, we have preserved our option of following through on the objections, but in order to save time we have said this is a 502(c) case. Let's have an estimation in order to save time. And if we meet that standard, the claims are actually estimated for purposes of distribution. This is not personal injury, so they are bound by the result claimant, by claimant, by claimant.

Now, we have C-2 through C-4000 here. Does this change the equation? You could say no, it doesn't change the equation if you want to go through claim, by claim, by claim. If you want to go through estimation, does the fact of their being all these claims change the equation? Yes. Because it

says there's a good reason to estimate. We've got so many claims. So, yes, the numerosity of the claims means that we're going to estimate. What then happens to the estimation? Does the evidentiary requirements change? No. Did the legal requirements change? No. Did the bankruptcy requirements change? No. It's the same thing. It's just that we're going to have to be very streamlined about it. So, that's exactly what we've done. We've tried to isolate, through the objection process, objections that will cut across hundreds of claims. We have tried to isolate, through the estimation process, issues like constructive notice, and Daubert, and statute of limitations that are going to cut across hundreds of claims. That is what estimation is all about. So, here's he problem.

THE COURT: Okay.

MR. BERNICK: You go through all of that and you say we've got a case management order that calls out the prosecution of these threshold objections first. It doesn't sound like there's any real disagreement with that. We then say the second part of the CMO should be estimation, step one. And that becomes critical. If we're going to have an estimation, we have got to pick out those issues and see what kind of impact they have, because our order is very different from theirs because it allows for the possibility that Your Honor will determine threshold issues that cut across all of these claims in estimation. So, their order and ours are

radically different.

And with respect to stage three, at that point they're much more the same. The problem with their stage three, with their version of stage three is really one of time.

THE COURT: Right.

MR. BERNICK: And time, in a very critical sense. If you go through and -- I'll go over to his screen here, if you go through and you see their committee, you're going to have these initial expert reports, and they take place on November 1. Now, under our schedule all of this on phase three would be compressed into a much shorter time period.

THE COURT: Well, look, you know, I -- it sounds great to say that it's going to be compressed, but look how many of you are out there, plus me. We all have to be in Court at the same time to get this done, and frankly, gentlemen, that has been a very difficult thing to accomplish. So, I don't have any problem with their time line, because I think it's probably a realistic time line.

MR. BERNICK: Well, let's make the comparison, but I then want to get back to this issue that I -- we've got to deal with. Our time line contemplates that we will have a hearing in July. Their time line contemplates that we'll have a hearing in August. So, the overall time lines are not substantially different.

THE COURT: Right.

MR. BERNICK: But here's the big difference. They want to have these initial reports on all issues on November 1. That's a waste of time. It's a waste of time because we know that the supplemental reports will be the only thing that you can count on. The supplemental reports will be done with the benefit, now, of the claims -- we're going to go through with claims objection. We want to go with phase one hearing. The initial report that then says we're going to give you the values of all 4,000 claims by November, considering -- it's just never going to happen.

THE COURT: Well, that's what I just asked earlier, about the discovery with respect to the claims process.

MR. BERNICK: Yes. That's what I want to address, is that from our point of view, what you do is you go forward with the -- with the objections first, that's already on its track. That gets done. You then have, under our order, and this is not really quite our order, you have phase one expert reports in October, because they ought to be in -- and then the hearing takes place in February. Now --

THE COURT: Well, I think the problem with the debtor's suggestion with respect to the method by which the expert reports are coming in is that it doesn't allow for back and forth. And frankly, I think you need a little bit of back and forth.

MR. BERNICK: Well, after you have a back --

THE COURT: Which is why I like the property damage committee's --

MR. BERNICK: We're happy to have the back and forth of the experts, when the supplement -- but what we think is critical is that there's no point in having the initial reports take place in November and the supplementals, then --

THE COURT: Okay --

MR. BERNICK: -- six months, seven months later --

THE COURT: So now you're saying you don't want them in tandem, you want to do your gateways first.

MR. BERNICK: No. What I want is what we've proposed, is that we have the phase one reports on constructive notice, and on methodology, to have those exchanged early. So, I say phase one expert reports in October. We're happy to have a supplement to that 30 days later, or 45 days later. But we want phase one isolated so that we can have the hearing in February. That's all that I'm saying. And with respect to phase two, we have phase two expert reports, the estimation expert reports due in January. I'm happy to have a supplementation 30 or 45 days later on that. But if you don't separate out those first issues, you really were losing the opportunity to trim the case so that the estimation reports are really focused on the buildings that ultimately are going to count.

THE COURT: All right. So, the disagreement seems to

be, at this point, not so much on your -- I'll just call them omnibus objections, the gateway objections. It seems to be on whether or not to bifurcate the estimation process so that some issues that the debtor wants to identify, like constructive notice and the Daubert issues are done before the whole estimation process.

MR. BERNICK: We've presented to Your Honor, if Your Honor wants to decide them, you can. If Your Honor wants to delay them, you can.

THE COURT: Well, if they're presented I have to decide them. Of course I'm going to decide them.

MR. BERNICK: Well, that's correct. But let me get to the last thing before Mr. Baena I know is going to have a response. And this comes back to this, so that everything is on the table. The real difference, the real complaint that he has is he's going to still -- we're still going to be having out here this problem that if I'm right and the defenses that we would lodge by way of objection are equally relevant to estimation and equally binding under the rules, he is going to tell Your Honor that what's the real difference between these two things.

THE COURT: The burden of proof.

MR. BERNICK: I don't believe it's even that. But -- I don't think so. But here's what the real problem is. He says this is not my job. It's somebody else's job.

THE COURT: Well, okay.

MR. BERNICK: And I want to be clear, we can't go down the road and have the position taken that somehow we're going to go through this whole process, but we're not really going to resolve these merits based issues on any basis that's binding with respect to the claimants.

THE COURT: Of course we are.

MR. BERNICK: Yes. And so, if that's going to be true, then we've got to be clear, is Mr. Baena going to be speaking for this people? Are they going to be speaking for themselves. If they're going to be speaking for themselves I want to get them here. Let's just get them here. We don't have to worry about --

THE COURT: That's why I said give notice to everyone. If the property damage committee chooses to take a position, it will. If it doesn't, it waives it. It's still going to be bound by the results, as are the claimants. So, give everybody notice and we'll see who shows up. Mr. Baena?

MR. BAENA: Judge, I just feel constrained to reply. First, the notion that all that the debtor is doing is streamlining the process by its CMO is, to borrow a word from Mr. Lockwood, poppycock. And the reason it's poppycock is because the notion of numerosity, which Mr. Bernick suggests is the driving force for this estimation isn't a concept under 502(c). There's only one reason for the allowance of an

estimation proceeding under 502(c), and that is that the determination of a claim would unduly dely confirmation.

THE COURT: I am not aware -- I am sure they are out there, but I'm not aware of a case in which a claim -- well, I can't say that. I actually had a case where there was only really one claim in the case, and it was estimated. But in every case that I've seen it has been groups of claims that are estimated, not a claim. 502(c), in the cases I've -- I personally am familiar with has been used to estimate groups of claims.

MR. BAENA: May I ask, Judge, who were the parties before you in that proceeding?

THE COURT: I don't think there was a committee in the proceeding.

MR. BAENA: It was the claimants.

THE COURT: The claimants were there.

MR. BAENA: That's the big difference here.

THE COURT: Well, we're going to notify the --

MR. BAENA: That's the difference.

THE COURT: -- claimants, and they'll show up if they choose. If they don't choose, they'll lose. I mean, you know, the default orders will be there. I can't protect everybody --

MR. BAENA: I just -- I just don't think we ought to pretend that we're doing anything other than creating a script for the process at a whole --

THE COURT: Creating a --

MR. BAENA: We're creating the script --

THE COURT: Okay.

MR. BAENA: -- for this process out of whole cloth. It doesn't exist. Numerosity is not in 502(c). There's nothing about streamlining the process in the Bankruptcy Code. It's not about any of that. We're trying to find a way to do this sensibly, and I don't think their plan is sensible.

THE COURT: Well, I have a -- I have a good way to do it sensibly. Don't have a trust for property damage, end of story. We'll litigate all the claims if that's what you want to do. There won't be a trust, and I don't need a committee. So --

MR. BAENA: Judge, fine. I mean -- what can I say in response to that -- that statement, Judge? I'm not here preserving my position. I'm here preserving the system, the process.

THE COURT: But are you? I mean, that's the question. Because I don't --

MR. BAENA: Well, Judge --

THE COURT: -- listening to your argument, Mr. Baena, I don't know what role you envision the committee having. If every property damage claim has to be litigated on its merits, there is no need for a committee.

MR. BAENA: No, Judge. We're putting a value on the

claims.

THE COURT: Right. That's what the estimation does.

MR. BAENA: I can do that, Judge. I can do that.

THE COURT: Okay.

MR. BAENA: I can help you put a value on the claims.

THE COURT: Good.

MR. BAENA: But when it comes to whether or not somebody had notice of a particular thing, I'm really not in the position that a claimant would be to give you the entire set of facts. And so, Judge --

THE COURT: You're not in any better position to value the claims.

MR. BAENA: But, Judge, you see, what they would like you to do is treat that as binary. Oh, you can't do that, then the claim is worth zero. My point is, in an estimation we put a range of values on claims.

THE COURT: Sure. There may be a range. I don't know what the outcome will be. I haven't heard the evidence yet.

MR. BERNICK: But it's based on the evidence in the law. It's not based on anything else. Your Honor, your idea of not having -- we put that plan out there as a way of creating a pot of money to continue where we were in the settlement process. They are the ones who say no. We're happy to have this be the litigation process. We'll be done with it

by June. We'll know what these claims are worth, and that will be it.

THE COURT: Okay. Let's go to it. I believe that the sensible conclusion to this is the following. Number one, the debtor ought to pursue what we have collectively kind of referred to as the gateway objections. They ought to be pursued.

MR. BAENA: And regular objections, too.

THE COURT: The regular objections.

MR. BAENA: Substantive and gateway objections.

THE COURT: Substantive and gateway objections ought to be pursued, period, end of story. Let's go to them. With respect to the estimation, I believe it's appropriate, once those gateway objections are determined, in fact, probably even while they're being determined, to go forward with discovery as to whatever the debtor isn't going to object to on a substantive matter, and to get supplemental reports after you get some rulings with respect to what is or isn't going to be allowed, because if the claims are not allowed they are not going to be estimated. They are already valued at zero. If they are allowed we still have to figure out what their worth is for purposes of a distribution coming out of this estate. So, they have to be estimated.

MR. BAENA: Agreed.

THE COURT: Okay. So, I think, although you're still

using different words, and there's still an issue about whether there should be, I guess, the phase two process in here, because phase one is the substantive portion of this --

MR. BAENA: Correct.

THE COURT: And phase three is the ultimate trial --

MR. BAENA: Correct.

THE COURT: -- the only question is whether or not to do a separate Daubert proceeding. And I think that's appropriate if the debtor wants to bring those motions, or the committee does. I mean, it can also be done as part of the substantive. It doesn't really matter much. It has to be done. If the debtor's view is correct that it will, because of the science that -- the standard, whether it's going to be dust, or air, or both, that can then be used at the main trial, is determined as a result of that hearing, makes sense. If the debtor is correct about that it might make sense to hear some of that evidence first so I can determine what I'm going to hear at the trial. But if you have to get geared up for it, whether it's a preliminary or whether it's part of the trial, I don't care where it's done. It has to be done. I need to know whether using dust samples is an appropriate methodology to get me to the estimation of these claims. I need to know that. So, it has to be done somewhere. I don't know that Armstrong is the means all and end all in this case. It's a different product, a different application. I don't know whether the

standards are the same. That's why I need some experts to give me some guidance.

MR. BERNICK: Your Honor --

MR. BAENA: That would speak in favor, Judge, of our process, I think.

THE COURT: I don't care whether it's done first or second. I mean, it has to be done. So, whether it's incorporated into one process or not -- Mr. Bernick, you folks have a great deal more knowledge about this process than I have. You're talking to each other on a different level. And I only see the tip of the iceberg, so I may have a different spin than is appropriate on this because I don't know what's under the water line. Okay. If, in fact, Mr. Bernick is correct that what's under the water line, in order to do the Daubert dust process as part of a final hearing, is the 600 pound gorilla, in and of itself, then it probably makes sense to weed that out first so that we can determine whether it's appropriate evidentiary standard before everybody goes out and tries to get dust samples in 4,003 buildings, or however many there are buildings. I mean, that may make some sense. It may save the cost. It may save a lot of expert work. And it may, in fact, streamline this process. If he's not correct on that estimation it doesn't matter. But I don't have any way of knowing.

MR. BAENA: Judge, can I ask for a five-minute break

at this point --

THE COURT: Yes.

MR. BAENA: -- so I can speak with my clients?

THE COURT: We'll take a recess until ten after 11.

MR. BAENA: Thank you, Judge.

(Recess)

THE COURT: Mr. Baena?

MR. BAENA: Your Honor, I guess that -- I hear the Court say that you appreciate the fact that our proposal does provide the flexibility that we're advertising. I hear you say, as well, that there may be threshold issues, or issues that are overarching issues that need to be heard. And I take those two comments and conclude that even as to the second point, our proposal can accommodate that process. Our proposal permits issues to be raised as they would be raised in any contested matter. Our proposal permits discovery in respect to those issues. It permits expert reports in respect to those issues. It even permits people to become better informed in the process of discovery and supplement their reports. And we believe that their position, on the other hand, unnecessarily advances those issues in the queue of things that have to be done. To some extent -- entirely, in fact, it truncates discovery for no particular reason at all, making it an inefficient process. And indeed, the proof is in the pudding that their proposal doesn't even anticipate you'll hear those

matters before we present expert reports on the value of P.D. claims, which makes the whole thing a waste of time, in my judgment.

THE COURT: So, let me see if I understand what you're saying. You're suggesting that if the debtor wants to file, for example, an objection to the Speights claim, fine, file it, but use your time line for discovery just related to the Speights objections. And then if --

MR. BAENA: No -- no, ma'am. Ma'am, my proposal has nothing to do with objections to claims, be they substantive objection to claims.

THE COURT: Oh. I'm sorry.

MR. BAENA: Or gateway objections to claims.

THE COURT: Okay. Then --

MR. BAENA: That process has already been defined.

THE COURT: Okay.

MR. BAENA: Do as they wish.

THE COURT: Oh. See, you're back to the difference between phase two and phase three.

MR. BAENA: I'm just on an estimation proceeding --

THE COURT: All right.

MR. BAENA: And what I'm saying is even if the Court wished to accede to the view that some of those phase two matters should be heard in the context of estimation, without precluding us, obviously, from arguing about that some other

time, our proposal accommodates that.

THE COURT: All right. So, you're saying essentially that the phase two and phase three issues should go through the discovery process together. If they're bifurcated for hearing they're bifurcated for hearing, but the discovery process should be open on all those issues?

MR. BAENA: Correct. Correct.

THE COURT: Okay. Mr. Bernick?

MR. BERNICK: We talked about this. I think we're pretty set on that. We've talked about this. In here, I think the only issue is is there any point in submitting the reports for ultimate estimation way over here in November. Our feeling is no.

THE COURT: Okay. So then let's change the time line and push the ultimate reports back. But let's get the discovery process going on all issues.

MR. BERNICK: The discovery process. That's fine. We can have the discovery process take place on all issues. We will have the discovery process take place on all issues commencing on September 1.

THE COURT: When I say all issues, I'm talking not about the gateway issues, I'm talking about your phase two and phase three. The --

MR. BERNICK: I understand that.

THE COURT: Okay. Fine.

MR. BERNICK: We will have that. And so, we'll call for discovery to commence on September 1. We will then say let's have the expert reports on October 17th for phase one. We'll have the expert reports for the hearing as we've indicated in our order. So, we'll have discovery starting --

THE COURT: No, wait. I think the proposal is discovery starts -- the initial expert reports are due on all phases at the same time. Then your non-expert list, your written discovery, and so forth I think we need - -maybe we need to talk about that. But the initial expert reports should be on all issues.

MR. BAENA: Twofold, Judge, if I may? First -- what we proposed is first, let each party be required to make initial disclosures as to the type of experts that they're --

THE COURT: That's fine.

MR. BAENA: -- going to call.

THE COURT: I agree. That's fine.

MR. BAENA: And then the initial reports.

THE COURT: That's fine.

MR. BAENA: As to all matters.

MR. BERNICK: That's fine. So, discovery starts on September 1. We will have a disclosure, say, September -- let's say October 1. We will have disclosure of all experts in terms of what the subject matters are.

THE COURT: Right.

MR. BAENA: You said September 1?

THE COURT: That's fine. I know. But, you know, if you need time it's fine. I'd rather build a schedule that works so that we don't have slippage later on.

MR. BERNICK: What we're talking about is description of subject matters. And I think it's going to be useless, but I'm happy to say fine, let's go forward with it.

THE COURT: That's fine.

MR. BERNICK: We then get to the critical point of are there going to be real expert reports on these threshold issues? We believe very strongly that there should be for all the reasons that we've indicated. We're even prepared, if it's necessary. I would have thought we could just do this under Rule 16 of the case management order, and we'll file motions on October the 17th dealing with these two issues. And then if Mr. Baena wants to say we can't respond to these, I don't think that that's really appropriate. At that point we set up a motion -- I think this could become case management -- all you have to, Your Honor, is say the initial reports for phase one will be October 17th, and, because Your Honor wants this dialogue process, any supplemental reports will be 30 days later. That way everybody can see each other's reports and decide okay, they want to supplement it. And then -- but then we are going to want that hearing. We're prepared to move forward, do whatever for it, but there is no reason why Your

Honor shouldn't ave the opportunity to further simplify this case.

THE COURT: Well, as I said, I really don't have a dog in the fight about when the hearing takes place, because I have to hear it, so whether it's first, or consolidated, from my point of view makes very little difference. What makes a difference to me is if the discovery can be streamlined, less costly, and so forth, as the result of doing the Daubert hearing first, then I'd like to do it first. But that's the reason for it, not as a -- not for any other reason.

MR. BERNICK: Well, that's exactly where I'm going, because -- because we don't want to have to go ahead and litigate the ultimate dollar value for all of these different building if they don't have the data to support their scientific case.

THE COURT: All right. So, what about the debtor submitting its expert report, whatever date you choose --

MR. BERNICK: October --

THE COURT: Have the committees submit their expert reports at a date after that, so they can see yours first, and then both of you can submit supplemental reports, or you, I guess, the debtor could submit a supplemental report shortly after that. That ought to take care of the committee's concern, at least as to the initial phase that they're being required to put in an expert report without really

understanding what the issues are going to be.

MR. BERNICK: Fine.

THE COURT: And it seems to me the debtor ought to take the lead in defining the issue that you want to litigate, and submit the expert report, give them a chance to file their own -- or the individual claimants, for that matter. I need to get back to -- somebody please don't let me lose track of that issue, because I want to get back to the coordination of the individual claimants and the property damage committee.

MR. BERNICK: And I'll make a further suggestion in order to, again, help focus this. We'll still call for the phase one hearing and then with respect to phase two expert reports, their schedule contemplated that we would be done I think in August. Ours is a little faster. Let's take the extra time, we'll have the phase one hearing on those two issues, and then have the phase two expert reports follow the phase one hearing by, say, 30 days.

THE COURT: Well, those will be supplemental expert reports to take account of whatever the rulings are. And --

MR. BERNICK: Well, no, but see, again, Your Honor, the key thing here is do we have, in the first expert reports, all issues? Or do we have, first of all, these two issues? If we have all issues there's no way it can be -- we can even start to submit them by October the 17th. Why? Because then we're talking about, you know, thousands of buildings. That's

the whole reason for phasing it in this fashion. So, our proposal would be that the first -- the expert report we would submit on October the 17th would cover these two issues, and we'd have the back and forth, and the hearing. We would then have the phase three expert reports, and we will go -- we'll go first, although I don't think it's really our burden, we're happy to go first. We'll do our phase three expert reports 30 days after the hearing. And then, again, they can respond and we'll supplement --

THE COURT: Okay. The concept of phases is -- I'm having difficulty in the -- on this record talking about phases. Can we define issues? It would make it easier for me if we could just talk about issues. It seems to me that this is the structure that you're both somewhat agreeing on, but not totally. Number one, the debtor is going to file whatever substantive issues you're going to file, and that track is going to go forward. While that track is going forward you're going to start discovery. The discovery that the debtor wants to start at the outset deals with the methodology and constructive notice. You don't want to go beyond that. The committee wants to go beyond that.

MR. BERNICK: We're happy to have discovery, if there's some type of fact discovery, or something like that. What we don't want to do is have our experts basically go through not only those two issues, but any and all other issues

that relate to all these -- all these buildings, including a dollar valuation for each building.

THE COURT: Because you don't know what buildings will still be left.

MR. BERNICK: Not only that, but it -- it's an enormous amount of work. I mean, you're talking about hundreds and hundreds of buildings. So, yes. But for both of those reasons, we want to defer submitting expert reports with respect to the remaining issues until we have a better sense of where Your Honor is coming out under those first two, and frankly, more time. So, that's the only difference. In other words, if we put this one up front --

THE COURT: Okay.

MR. BERNICK: -- and we litigate it up front, the only burden that that imposes is that at the phase one hearing we then have the last phase. It may mean that the hearing -- the final hearing slips some, but we're much smarter about what we're doing.

THE COURT: All right. Mr. Baena, I don't -- again, in theory, I don't have a problem with that structure, provided that the claimants are given actual notice of the fact that these objections are pending, and have an opportunity to participate if they choose. To the extent that they don't choose, and the property damage committee is concerned about the outcome of those issues for the eventual estimation of the

remaining issues, then I think the property damage committee does have a stake in this and should appear. But if you choose not to, if you disagree, whatever the outcome is, you'll be bound by. Everybody will be bound.

MR. BAENA: Judge, can I ask you to do just what you asked us to do, and describe the issues you're now referring to?

THE COURT: I am referring to the methodology and the constructive notice issues.

MR. BAENA: As you just said it, Judge, are you envisioning those to be raised by the debtor in the context of the estimation or in respect of all the claims?

THE COURT: I don't know the difference.

MR. BERNICK: We'll do both. I mean, again, to be very clear, and somebody pointed out in the break that I wasn't as clear on this as I should be. On September the 1st we will lodge formal objections to each and every claim, period. So, on all grounds -- so, it will be there. We will be seeking to disallow those claims. The methodology, the procedure that we're adopting for purposes of resolving some of the objections is a claim by claim objection process. The methodology that we're seeking to adopt under the rules for the liquidation of all of the remaining claims is estimation under 502(c).

THE COURT: Okay. But we still need to get to the allowance issue first, before you want to liquidate the rest.

MR. BERNICK: That's right. We want -- but the only stuff that we're going to seek to disallow under a claim-by-claim basis without estimation are these early threshold matters --

THE COURT: Right. So --

MR. BERNICK: -- like authority --

THE COURT: Right. So, why are they not done first?

MR. BERNICK: We're asking that they be done first.

THE COURT: Okay.

MR. BERNICK: That comes first.

THE COURT: All right.

MR. BERNICK: Then, while that is underway, we then start discovery. Well, the discovery process with respect to anything else --

THE COURT: Is open.

MR. BERNICK: -- will be opened up. We'll have the disclosure on October the 1st of all of the experts. No problem with that. We will then take up, in the first expert reports, these two threshold issues of constructive notice and the Daubert methodology. We will seek to have all claimants individually bound by the outcome of that proceeding, but it will be in estimation. We won't move for summary judgment. We could. We can move for summary judgment. Judge, if you want us to move, we'll move for summary judgment. But you don't really have to. You can take it under 502(c). You can take it

-- I don't really care. It makes no difference.

THE COURT: Well, as to the methodology issue, it seems to me that the 502(c) process works because if the main issue for the methodology is whether or not dust evidence will be permitted in the hazard phase of the trial, that's an issue that will effect the product in all buildings.

MR. BERNICK: That's correct.

THE COURT: So, that seems to be appropriate whether you call it a 502(c), or a common issues trial. Whatever you want to phrase it, that seems appropriate. With respect to constructive notice, however --

MR. BERNICK: Yes?

THE COURT: -- it seems to me that that notice is going to be driven by each individual state law, and so you at least have to group together --

MR. BERNICK: We will group the state law. But, see -- and again, you can call either way. You can say we can move for summary judgment, or we can call an estimation. We will break out the states in which the claims are lodged by groups, and then we will present the evidence which we believe is generic across the state we believe is dispositive across the states. And then we will argue to Your Honor what the effect of that evidence is.

THE COURT: I think that would be more appropriate by way of summary judgment on those legal issues.

MR. BERNICK: Then we'll file a motion for summary judgment.

THE COURT: Okay.

MR. BERNICK: But bear in mind that summary judgment can be denied on the grounds that there's a material issue of fact.

THE COURT: Yes.

MR. BERNICK: And if that's so, this is the advantage of estimation. In estimation you can resolve that issue of fact right up front. In other words, you can say I would have to sit on that matter as a trier of fact. It's not really summary judgment where something becomes a strict standards. With estimation you can decide that --

THE COURT: But what I'm confused about, and maybe it's just my confusion, but it seems that we're going back to mixing apples and oranges. If you're talking about an allowance process, then I think you need to prove that the claim is either allowed or not. If you're talking about estimation for both allowance and for distribution, then you can use estimation. But nobody is going to be bound by it. It will still go into the trust. I will not estimate, for ultimate allowance purposes, without giving the claim holders notice and finding out whether I've litigated. I will not, in this context, do it.

MR. BERNICK: That's exactly what we want -- we'll

give them notice.

THE COURT: Okay.

MR. BERNICK: That's the whole idea, is that we'll give them notice. We're all kind of, again, it's a complicated thing because I guess it doesn't often get discussed. But we're all taking about the same group of chickens here.

THE COURT: We are. That's the thing.

MR. BERNICK: I mean, we have a certain set of facts. The facts are going to be -- what we say everybody knew in the marketplace. They're going to argue whether that constitutes reasonable notice or not.

THE COURT: Right.

MR. BERNICK: Constructive notice or not. So, that's a canned brief. Now, you then say, well, do you do it by summary judgment? If we do it by summary judgment we still have to notify the individuals.

THE COURT: Yes.

MR. BERNICK: And it's going to be binding on the individuals. And the standard is going to be what's reasonable. And they're going to say, oh, well, gee, what's reasonable is for the trier of fact. It's not a matter of law. If we go estimation, we have to provide notice to all the individuals, because ultimately it is binding on them. But then you can resolve the mapper, as the trier of fact in estimation, and it is binding. That's the whole idea of

502(c).

THE COURT: Well, I am going to reserve until I see the expert reports and how the -- I'm going to ask you to set this up for a further status conference before the close of discovery so that I can see, at that point, where this issue is coming out, because here is the problem. At this stage, without knowing even what the state laws provide, I don't know whether I want testimony on what any particular building owner knew, should have known, and whether it was reasonable or not. I really don't know whether I think it's appropriate for estimation, or whether I think it should be done on an individual basis. And I would prefer to err on the side of making sure that everybody has appropriate due process rights to be able to be involved in that issue. I agree with you, Mr. Bernick, if it can be done by estimation I think 502(c) is a vehicle in which -- or Rule 42, however you want to use it, is a vehicle that could be used for that purpose. But whether it's appropriately used, right now I'm just not sure. So, I want to reserve decision on whether it's going to be by summary judgment and an evidentiary process geared toward summary judgment, or whether it will be geared toward estimation.

MR. BERNICK: So, what we'll do in the case management order is specifically provide for that. But the expert -- the expert reports will be submitted in the sequence that we've talked about. We go first. They go second.

THE COURT: Right.

MR. BERNICK: We then supplement. And then, I suppose what will happen is on the basis of that, we will then -- both sides will make a submission to the Court on how to dispose of this issue, whether there ought to be a Daubert hearing -- whether there ought to be a Daubert hearing slash summary judgment, or slash estimation, we'll submit briefs.

THE COURT: There will be a Daubert hearing on the methodology issue.

MR. BERNICK: Right.

THE COURT: There has to be. I don't know that I need -- I don't know that I need a Daubert hearing on the constructive notice issue.

MR. BERNICK: I misspoke. We will submit briefs in advance of that hearing date with regard to whether -- what is going -- what should happen on the hearing date. Should there be evidence for purposes of Your Honor making a determination about the estimate?

THE COURT: Right.

MR. BERNICK: Or should it be handled as summary judgment? And then I'm sure that we'll take that matter off during this period of time.

THE COURT: That's fine.

MR. BERNICK: But we'll go forward with the expert

reports. We'll contemplate the hearing. And we'll reserve and submit the appropriate briefing to Your Honor on what the appropriate procedural vehicle is for the disposition of the issues.

THE COURT: Yes. That's fine. Meanwhile, I believe the Daubert issue, it may not be as easy to grapple with as a matter of evidence, but it certainly will be easier to prepare for as a matter of trial. So, that track, I think, can go marching forward while I'm deciding what to do with the constructive notice issue.

MR. BERNICK: And then with respect to phase three, I still believe that the right idea is that, again, anything can be happening in this period of time for people to take discovery, do whatever they want. But then at a point in time after the Daubert hearing we will then have the initial reports, the same process, initial responsive reports going to the ultimate estimation. And then the estimation hearing itself will probably be bumped back 30 or 45 days from what we proposed because it's just going to take -- it's going to take more time.

THE COURT: That's fine. I'm comfortable with the bifurcation of the expert reports so that the first expert reports will address only the methodology concerning the dust versus air. Whether you want to do them together, or not at all, whatever the experts will say, and the constructive notice

issue. Then there will be supplemental reports to address anything left after the Daubert hearing and the constructive notice issue is either tried or addressed by way of summary judgment, however it's going to be done.

MR. BERNICK: What if we tried to prepare something and confer with Mr. Baena to see if we can just communicate with the Court in some fashion, on an appropriate order, we'll take the transcript --

THE COURT: That's fine. And the debtor will take the initial, or, with respect to all expert reports the committees, and anybody else who chooses, will have a chance to file a response. And then the debtor will have a chance to reply.

MR. BERNICK: If -- we have one last issue, I think, on this, which is ZAI.

THE COURT: Well, wait. I don't want to go there yet.

MR. BAENA: I just want to make sure, though, Judge, that you put off to the side the constructive notice issue for the time being in terms of --

THE COURT: How to decide it.

MR. BAENA: Exactly.

THE COURT: Yes.

MR. BAENA: And that will be a matter presumably we'll brief, and argue along the way, as the Court instructs

us.

THE COURT: Well, I think what you should do is whatever discovery you choose to do, at the end of the discovery period but before that issue is tee'd up for trial, put it on the agenda for a status conference, give me briefs that will support your position. Please, don't give me huge briefs. I am inundated with paper in this case. I literally am having trouble getting through it all with everything else. So, please, keep them short. You know, I don't need 30 cites. Give me a good case. I really would prefer having one good case than 25 that really don't say much anyway. Please, tell your clerks and your associates, look for the case, and give me the case. And if there isn't the case, then give me two or three. But don't give me 35. I really don't want to have to look at all that. I just can't imagine that it's going to be even that well researched in this context, frankly. So, yes.

MR. BAENA: Okay. Now, on the methodology issue, the Daubert issue, the Court is not saying that we still can't -- I don't want to use too many double negatives -- the Court didn't instruct us against arguing that the process is inappropriate. We can still do that.

THE COURT: You can still argue that.

MR. BAENA: And we can even argue at what point the process should be employed.

THE COURT: And you can put that on the same agenda

for the discussion right at the close of the discovery.

MR. BAENA: Right. Correct. Okay.

THE COURT: All right? But -- so, I'm inclined to think, right now, Mr. Baena, but it's without hearing any of the experts, and I may change my mind, that if Mr. Bernick is correct, I'm probably going to be inclined to say the Daubert hearing should go forth first.

MR. BAENA: I understand. But you haven't foreclosed our opportunity.

THE COURT: I have not foreclosed it.

MR. BAENA: I appreciate that.

MR. BERNICK: We should provide for that -- we should provide --

THE COURT: Yes.

MR. BERNICK: We'll --

THE COURT: Yes. You should provide for putting that on the agenda and for briefs on that issue. But truly, folks, please, you know, give me ten good pages. Don't give me 120 that repeat themselves ad infinitum. I don't always get it the first time, but I am comfortable enough admitting that on the record and asking for guidance. So, please, just say it once.

MR. BERNICK: ZAI.

THE COURT: No, I'm not ready yet.

MR. BERNICK: Okay.

THE COURT: With respect to the individual claimants,

I still want a coordination function because it may be that the individual claimants are looking to the committee for some guidance, or help, or filing, or whatever. And Mr. Baena, I really think before an individual claimant has to incur legal expenses to hire a lawyer to come here to take a position that the committee is going to take anyway, they ought to know that so that if they choose to have the committee essentially act as its surrogate in that sense, that the committee goes forward on that issue. If they have a different position, then they ought to know that they have to show up here and litigate it on their own. But to the extent that it's going to be what the committee is doing anyway and they don't choose to have separate counsel, it seems to me that that is an appropriate committee function. So, I would like you still to be the coordinator, and I don't expect to hear from any individual claimant's counsel unless they first checked with you to find out what the committee's position is, and then either get on board or don't get on board as they choose.

MR. BAENA: We might be well advised, Judge, to cobble together some better recitals in the orders that we propose to you --

THE COURT: I think that would be helpful.

MR. BAENA: -- to ensure that P.D. claimants are aware of your feeling on that subject.

THE COURT: Yes. I think that's a good idea, and I

think this order should make it clear that when I get to the ultimate resolution, whether it's by way of summary judgment, or estimation, or litigation, everybody is going to be bound.

MR. BAENA: Judge, I'm glad you brought that up. We keep saying that, and frankly I'm not even sure what that means at this juncture.

THE COURT: It means if they don't like the opinion they'd better appeal, because they're not going to get a second bite at the apple in the plan process.

MR. BAENA: Okay.

THE COURT: This is, in my view, preliminary to the plan process. It is fixing the claims, the property damage claims, figuring out how the trust has to be funded --

MR. BAENA: Right.

THE COURT: -- and it may not provide for the percentage of distribution, but it is going to be the whole universe of what will be available for distribution.

MR. BAENA: That's fine, Judge. I understood it that way. I just wanted to make sure it wasn't something broader, because when Mr. Bernick says it, it sounds like it's a little bit more significant than that. Not that that's not significant --

THE COURT: Because he has a deeper voice than I have.

MR. BAENA: Well -- okay.

MR. BERNICK: I should hope so.

(Laughter)

THE COURT: All right. Are you two able, now, to get together and do an order?

MR. BAENA: Yes.

MR. BERNICK: Absolutely, Your Honor.

MR. BAENA: We enjoy -- they never serve lunch on time. I think we can do this by phone, though. Okay.

THE COURT: Okay. Does anybody else want to be heard on the issue of the structure we've just been talking about now, before I send these two out to craft an order? All right. You're it, folks. No one else wants to be heard. Yes? Mr. Baena?

MR. BAENA: Do I need to address Zonolite, Judge? I must say that if I did I would tell you the following. First, this whole notion of Zonolite is an afterthought. It was raised for the very first time like a stroke of lightening at our meet and confer in Washington two weeks ago Friday. Mr. Bernick realized that in addition to Mr. Speights he needed to confront Zonolite, and now he was going to propose a Zonolite case management order, estimation process, something we've never, ever discussed before, briefed before, or spoke with the Court before. And then we get his proposal and you'll recall, Judge, you directed the parties, if we couldn't reach agreement, that we would each submit our orders, our proposed

orders at the same time. No rebuttals. Well, Mr. Bernick took that once step further. He submitted three orders. And one of which was Zonolite. We haven't had a opportunity to comment on it. We have very strong feelings. We think it's premature. As we continued to say, the issue that's already before you, Judge, still needs to be resolved before we can --

THE COURT: It does, Mr. Baena, because -- it does need to be resolved, and I truly am working on it. But you're not going to be getting an opinion from me for at least a month, and probably longer. But nonetheless, I am working on it. It's just going to take that -- given everything else I'm working on at the moment, it's just going to take me that long to get through it. Plus, I'm going on vacation, and I'm not working on this case while I'm on vacation. Don't have any emergencies for the next two weeks, please, because I'm not going to hear them in the next two weeks. I'm telling you now. So, keep your emergencies for three weeks from now.

MR. BAENA: Actually, Judge, I don't think we've ever brought an emergency before Your Honor in this case.

THE COURT: I'm not sure, actually, that you have. This one is actually pretty good.

MR. BERNICK: The Court is looking at me.

(Laughter)

MR. BERNICK: No emergencies.

MR. BAENA: I was looking at Jan Baer, because she's

the historian of this case.

THE COURT: Okay.

MR. BAENA: I don't think we ever have, Judge.

THE COURT: All right. Well, don't for the next two weeks. Okay? So, in any event I am working on it, I do think you need a ruling before we go out with a bar date order with respect to Zonolite because I think the structure -- well, whether you need an order at all will depend on the outcome. But the structure of the order will clearly depend on the outcome. So, I really think that should be deferred.

MR. BERNICK: We have no problem with it. We just wanted to -- in -- the bolt of lightening is exactly as Mr. Baena characterized it, it came out of absolutely nowhere. There was no warning. But when Your Honor -- when I shoed up at the last hearing and I heard all of the clamoring to terminate exclusivity, to bring an end to this case, we went back and said how can we do that? We've got to cover all of the bases, including Zonolite. So, I'm not saying that somehow it should all get resolved today. Obviously Your Honor -- if Your Honor is working on an opinion that would be extremely helpful. But at some point in time we've just got to make sure that we don't have this be carrying off at the end. That's --

THE COURT: When is the -- when are the September and the October omnibus hearings?

MR. BERNICK: I don't even --

UNIDENTIFIED SPEAKER: September 22nd -- 26th.

MR. BERNICK: September 26th.

THE COURT: Okay. The end of the month. And then October's is at the end, too? Put the issue of the Zonolite case management order on the October agenda. I'll do my best to have an opinion out by then. I'm not going to promise, but I'll try.

MR. BERNICK: That's fine.

MR. BAENA: Would it drop off the agenda if you don't issue your opinion by then?

THE COURT: No. Let's put it on for status conference, because at least I can -- by then I can -- if I don't have the opinion out I can probably give you a better estimate of when I'm likely to get it done.

MR. BERNICK: Your Honor, if there's nothing else on P.D., we would then move to personal injury. Mr. Lockwood and Mr. --

MR. BAENA: Thank you, Your Honor.

MR. BERNICK: -- have been waiting so patiently for this event. But I guess I thought I would inquire of the Court what Your Honor's schedule is, and --

THE COURT: Well, I need to give my staff at least a short recess for lunch, and I'm -- maybe those of you who want to get some lunch, too. To get down -- if you stay in this building, and then back up, it normally takes about 45 minutes

to get there, get something to eat, eat, and get back. So, I would propose maybe we recess until 12:30.

MR. BERNICK: That's fine.

THE COURT: Okay. And then I have a conference call that I think I told you about earlier. At the moment I don't recall what time it is this afternoon. It's either at four or at five.

MR. BERNICK: Yes. Well, I would hope that we can restrain ourselves at least to the point that we don't jeopardize that conference call. That's no commitment --

THE COURT: Okay. Well, we're going to be taking a recess for the conference call, anyway, so --

MR. LOCKWOOD: Well, we could certainly shorten things in the matter if Mr. Bernick would rely on his July 13th filing instead of spending an hour or so walking through it before I get to respond.

MR. BERNICK: Well, I'll do my best to restrain myself, but will you promise to go no longer than I do?

MR. LOCKWOOD: No.

(Laughter)

THE COURT: Okay. We'll be in recess until 12:30. We'll start with the personal injury order, then.

(Recess)

THE COURT: Please be seated. All right. After a delicious lunch in the cafeteria area downstairs, I'm sure

you've got everything resolved on personal injury.

MR. BERNICK: Absolutely.

THE COURT: Okay.

MR. BERNICK: In fact, I solicited -- there was such a feeling of, you know, good will, and good atmosphere in the room, just now I said to my brethren, I said, exclusivity, well, come on, let's just reach agreement. And I'll tell you what the result of that poll was, I guess, before we break at the end of the day. I'm mindful of the time, Your Honor, and I think people are also mindful of their flights, so I'll try to move through this quickly.

As I indicated at the outset, our goal is very concrete, which is to get the questionnaire approved and to get the CMO approved. But inevitably a lot of issues have been raised, and I'll venture to say that at the end of the day the reason -- these are all old issues -- not old issues in the sense they're irrelevant, but they've been raised before. And the chorus that we keep on hearing on these issues that, just like the chorus we keep hearing on exclusivity, does serve a purpose. And the purpose is they're essentially negotiating with the Court. Why are they negotiating with the Court? Because at the end of the day, if they can chop down the case management order, chop down on the questionnaire, that ultimately helps their goal. Our own reaction to that, and our response is very simple. The right kind of forms should go

out. The questionnaire should go out. The right kind of CMO should go out. Those are the drivers, and as long as we're proceeding in an expeditious fashion, which I believe that we will, and the parties will, they are birds of a different feather in terms of what happens with exclusivity, or what happens with some of the broader plan issues that have been raised. Let me put that particular position in context, and let me go through this pretty quickly.

As you've seen from the personal injury committee's brief, my brethren across the isle are very active all over the country in dealing with these kinds of issues. We hear about Federal Mogul, we hear about G-1 Holdings. And they're all there, and you can see that when it comes to this case they're very careful. They're fighting this kind of land war in China, and they want to make sure they don't give up on a position. So, in fact, they have not. They are very scrupulous, and their briefs articulate all of their positions, so that nobody can accuse them of having waived any of them. But to do that here they have to set up what are essentially a bunch of straw men, because we're not doing many of the things that they insist we cannot do. We're not asking the Court for the kinds of things that they insist are totally inappropriate. They have so cowed us over all these years of litigation we don't have the temerity to ask for some of the things that they are now suggesting that we're asking for. We're buckled at our

knees, and it's still not enough, I've got to say I want to surrender, so here's the surrender.

THE COURT: Do I get to judge credibility in this --

(Laughter)

UNIDENTIFIED SPEAKER: You just did, Judge. You just did.

(Laughter)

THE COURT: Thank you.

MR. BERNICK: I'll state it here in black and white and red. We are not seeking, in contrast to what we're doing with property damage, where the rules are different, we're not seeking to disallow claims when it comes to the estimation that applies to the personal injury claims. We're not asking for approval of a proof of claim form. We're not seeking that. We're not seeking a bar date. We're not asking for the displacement of one tick or iota of state tort law not on the agenda. And we are not fighting the tide of prior decisions, which we'll see in a minute this notion that, oh, this is all accepted wisdom, and it's done this way, and only Mr. Bernick and W.R. Grace want to do it this way, that's illusory. The fact of the matter is there are a broad spectrum of different issues that are confronted in these cases. There are a broad spectrum of results that have been achieved. What is it that we are asking for? We go back to this basic chart. This is the chart of claim filings over time, and basically we say,

well, we've got a history. The history shows the tremendous fluctuations. We can actually have a doubling in one year of the number of claims that are being filed. We say to ourselves, well, what guidance does history actually bring us in talking about what the real liability is? And our answer is, if you take this history at face value, it tells you almost absolutely nothing, because it's driven by a system that's not driven by science.

In connection with the Babcock and Wilcox case, which is a case that the -- our personal injury committee is fond of quoting and citing to, I am -- lead counsel, until the settlement was reached in the Babcock and Wilcox case, and was involved in all of the different decisions that they now are talking about. And in the Babcock and Wilcox case, we went in with this -- with a history that also had fluctuations to it. And I had the opportunity, in that case, to take the deposition of the person that they bring around the country to testify as an expert, Dr. Peterson. And the question I put to Dr. Peterson that was, are you telling me that these filings and the future filings are driven by actual disease caused by Babcock and Wilcox? No. Can you identify for me any one claim, Dr. Peterson, that was filed, or that will be filed that actually is disease caused by Babcock and Wilcox? A nonsensical question. And the answer ultimately was no. Are you telling us that your model is epidemiologically driven?

This is all spelled out by science? No. It's a social behavior model, social behavior being how cases get filed against companies. The social behavior of claimants, the social behavior of lawyers. It's not epidemiology. It's not medicine. So, we know what the history is, and will not be contested in this case, a history that reflects many, many different dynamics. The question is what we have to focus on here is what is the liability, the legal liability?

So, what are the implications? Well, you can see that if we try to extrapolate, as we ultimately will have to, we try to extrapolate to the future, based upon that history, you can see, right on the face of it, that there are a variety of different results that can be achieved. Is there a real disease curve that follows through under here, because many of the claims really don't involve disease? By contrast, is the disease curve one that actually peaks in 1995? Is it one that really peaks in 2000? Where do you draw? What do you do? How do you actually know that there's any science that says that the liability of the disease is real. And depending upon where you draw that curve, you get vastly different results in the future because all the value is largely future-oriented value. So, to try to solve that problem, what we essentially are doing here is it's fairly straightforward. We take a look at the claims that were pending as of the time this case was filed. So, we go to 2001, and it's a little bit apples and oranges,

because these are all numbers of claims filed. We're going to take, in 2001, all claims -- the claims that were then pending against the company, in other words, we take a snapshot of a real point in time. We don't seek to alter it in any way. We take all of the claims that were pending then, which will include many claims that were filed historically, and we analyze these claims to see -- to inform the Court one of the different categories and types of claims, and what kinds of issues are they with respect to different groups of claims for purposes of ultimate estimation. That's where it is that we're going.

Now, the question will be raised, well, what kinds of filters, what kinds of categories are you going to draw, and aren't you really altering the law that would otherwise be applicable to those claims in the process of thus categorizing them? Well, the answer is, again, I've got to give you a bunch of nots. We are not seeking to impose a different state law standard. We are not seeking to create a new standard for diagnosing disease. They say, well, you know, you're using this standard for asbestosis, but the real standard is a different standard. We're not seeking to do that. The focus, from beginning -- the time that we filed this case all the way forward to today, is not the standard for diagnosis. It is not the state law standard. It's the process of making the diagnosis. It is the methodology for gathering medical and

exposure data. It is the methodology that is applied in the process of reaching the diagnosis. And reliability of data and reliability of methodology are straight Daubert issues. It's the process, the process, the process. What are the drivers of what we're talking about here?

(Pause)

MR. BERNICK: The transparency -- just didn't work out right. But the drivers for our estimation under the Code rules which incorporate Daubert are reliability drivers. It's process is is the right method being followed? And it really falls into three major categories. One is reliability of medical evidence. The second is reliability of exposure evidence. And last is the reliability of diagnosis. Now, the predicates for going down this road are very, very clear. You begin with the medical evidence. We know that, as early as the 1990's, it turns out that an audit was done of the claims for asbestosis that were being filed in the Johns Manville Trust. And that audit showed an absolutely enormous failure rate. That is that the readings that were being reached by these doctors simply were not replicable readings. 46 percent of all claims submitted were submitted by only ten doctors. They are cranking out hundreds and thousands of claims. The failure rate of those ten doctors was 63 percent, over one-third on audit showed no disease whatsoever. It was -- say it was a fraud, it wouldn't be far fetched. Now, the claimants point

out in the briefs, say, well, you know, that was all raised before Judge Weinstein, and he rejected the whole idea. That's just a flat misrepresentation. A case was filed called the Adams case. The Adams case was actually filed by people who wanted to compel the trust to stop doing the audit. It was the trust, itself, that conducted the audit. What Judge Weinstein has done in open Court, and I actually litigated this in the context of the Manville Trust case against the tobacco industry, it's all -- totally is a matter of record what Judge Weinstein said was, look, this plan got put together. The class action settlement got settled. And basically a deal is a deal. You can't go back on the deal. The deal didn't call for the trust doing an audit. It was not that Judge Weinstein in any way, shape, or form said that the audit was invalid, or that it was wrong. In fact, Judge Weinstein, on his own motion in 2002, or 2001, raised exactly the same questions all over again. Why? Because the trust was running out of money. And all of these trusts, on their own motion now, have clamped down on the kinds of claims that will be accepted because there is this big problem.

But this is not all. Literally, over time, a whole series of studies have been done. We have supplied a booklet to Your Honor of all these slides, and we've also given copies to the other side. The Kumho Tire studies in 1990, to Owens Corning in 1996 and 1997, the Penn State audit, which I just

showed Your Honor, to our own audit in Babcock and Wilcox, the claim forms went out. These were claim forms made into questionnaires, and they were answered. And a road map was put together. And it turns out that 74 percent of the claims did not allege diagnostic results consistent with one impairment or asbestosis. Something like 30 percent of the claims didn't even have any medical evidence. There's no product I.D. in vast numbers of these claims. They say Babcock and Wilcox, this approach was rejected. That is flat out a misrepresentation to this Court. The road map was put out before the Court and it languished. Why? Because the Judge probably wanted the case to settle. She reached no determination on the summary judgment motions that had been filed. She reached no determination on the results of the claim process. She reached no determination that the process that she had set down was somehow contrary to law, or was not the right way to proceed if it could be done in an expeditious fashion. So, the idea that Babcock and Wilcox supports their position is absolutely contrary to the facts.

Then we have other reports that have been done more recently in connection with the Owens Corning case, and of course with the Johns Hopkins study, itself, which show that 95 percent of the x-ray films did not have abnormalities, whereas the original plaintiff's B readers diagnosed 96 percent as showing the abnormalities. What is it that the P.I. committee

says? Oh, I guess people could disagree. We're supposed to pay money for that? We're supposed to pay money to the estate when it produces exactly the opposite result when reviewed by people who are independent?

Now, at the end of the day we then come from the medical evidence to the exposure data. And Grace is vulnerable on the exposure data, as well. Why? What do I mean? There are two prongs. A claimant comes into a doctor for purposes of diagnosis to see whether they're sick or not. That's one prong. That's the medical evidence -- the medical evidence that's considered. The second prong is sick from what? Whose product? And that is equally, if not more important an issue is the medical evidence itself. Why? Because the question is who pays? And we all know that most of the companies that actually were responsible for asbestos-related real illness has long ago been in Chapter 11. And as they moved into Chapter 11, the claims have shifted as a result of what Dr. Peterson would call social behavior, the claims have shifted to more solvent entities who may or may not actually have been responsible. This is what we've seen, is there's been a dramatic increase, traditional types of increase, non-traditional defendants, that is not the mainstream defendants have received more and more claims, and it became extreme, literally extreme, just before Grace filed. What happened? This is a compilation taken from the Rand Report, the 2005 Rand

Report, and it shows that in industries that had never seen significant claims, like the textile industry, like the automotive industry, in 1999 and in particular in 2000, whoom, claims go through the roof. Now, was that driven by the fact that all of a sudden a lot of people got sick from working with brakes? It got -- it happened not because of any medical or biological process, that happened as a result of the social behavior of litigants. That's the problem if you don't have reliable evidence of exposure being required. And what happened to Grace during that same period of time, Grace's claims also skyrocketed. So, there was a concerted effort, in 2000, to shift, both increase claims and to shift claims more broadly to solvent parties, something that can only happen if there's not reliable exposure data required. Is Grace vulnerable to this problem? You bet. Our own sampling of the Grace claims, and there's one that we've shown repeatedly, and it has never been gain say by any comparable study that they have ever done through the committee shows that in the one area where the use of Grace products was most pervasive, which was construction, this is the fireproofing area, where the stuff gets put on all the girders, only 12 percent of Grace's claims are being made by people who had an occupation within that construction area, whereas we see we go from iron and steel production, ship building, railroad, auto maintenance, tire and rubber manufacturing. We've got all kinds of people who are

saying, from all kinds of industries, pay my claim. So, we've got a real problem with the reliability of exposure data.

Now, there's a way to get -- exposure data to. You get very specific about what was the occupation for what period of time, and as a result what was the dose? And in fact, in the Chimino case that was litigated many years ago, they actually did dose calculations based upon the location of the particular workers. You can do it. And in fact, the case law in many instances requires it. They purport to say that the case law doesn't believe that dose is relevant? I don't know where these people have been. Dose has been used repeatedly, repeatedly, as a benchmark for determining under Daubert standards whether, in fact, there's sufficient reliable science to implicate a product. Just recently, in the PPA litigation Judge Rothman looked for the doses that were involved and the studies that implicated the different disease end points for different forms of PPA. Does is absolutely a key determinant. And it's determinant here because it drives risk.

So they say, well, you can't do that, though. You can't produce all of this reliability scrutiny. You can't do it if you're dealing with thousands of claims. And that really is the pitch that they've made all across the country is, Judge, you can't do it with respect to thousands of claims. And, of course, the pitch that we're been trying to make is

yes, you can. You can actually do it through claims allowance or disallowance, but you certainly can do it in estimation. And the best evidence of how doable it is comes from what Judge Jack just did in the silica litigation. Basically Judge Jack took a look at exactly the same machinery that has produced all of these claims, the machinery of people, of high volume B readers, of doctors processing claims and issuing diagnoses, of lawyers helping to set up trailers at factories and the like to get people to come in. She took that exact same machinery, and the exact same kind of diagnostic data which is B reads and PFTs, and the same doctors, and the same lawyers, and she looked at it real hard as part of her MDL. And she didn't even have estimation available as a tool. She did it as part of the MDL under good old -- under the good old rules of federal procedure. So, what is it that she found with respect to the -- this machinery? We quoted it to Your Honor in the brief, and it could not be clearer, she called it as it was. The diagnoses are more a creation of lawyers than of doctors. The diagnoses were manufactured for the money. This was a scheme, willingly devised by lawyers, doctors, and screening companies. Every meritless claim that is settled takes away money from people whose claims have merit. The allegation here is clear fraud, and you can't sugar coat it. And she saw the testimony of the doctors as providing great red flags of fraud. This went through the fact that occupational histories were taken --

were not taken, that basically a B read was designed to stand in place of this. She took issue with and found that the diagnosing reports were deficient, basically the same language is being used everywhere, and we'll show you some of that language. She also took issue with bias, the doctors were all biased. Guess who the doctors were. It's the same doctors who were involved in the Manville case. It's the ten high volume doctors that all of their clients lawyers go off and retain and do this -- it's the same people turning out silicosis diagnosis, turning out asbestosis diagnosis, turning out claims.

How does all this impact Grace? Thousands of Grace claims involve the same lawyers. We've just gone through and taken a list of the different law firms who are involved in that case, in sponsoring that machinery, and we've got literally thousands and thousands of Grace claims that come from exactly the same law firms. What about the doctors? Thousands of Grace claims involve the same doctors. And these are the doctors -- the famous Dr. Harron. Dr. Harron has supported claims of the -- has supported claims that are now pending against Grace. In fact, I think we actually brought a claim. You can see what kind of medicine is being done here. This is a claim currently pending against Grace. It is signed by Dr. Harron. There he is. And we've blocked off the name of the claimant. And look at all he has filled in about the

patient history. There is none. The examination. There is no examination. Nothing. It's just -- it's just -- it's just a film. And yet he says, okay, here's the film. There's plaque on the left half of the diaphragm impression. And this is what now supports the fact of an asbestosis claim in this litigation, which is all hunky-dory, if you believe the personal injury committee. It says consistent with asbestos-related disease. That's the diagnosis. Consistent with. They didn't say it's asbestos-related. It doesn't say it's asbestosis. It's consistent with asbestos-related disease because I squinted and looked at the B reading, and everybody else will read it a different way, and that's what I can say. And this would be used to support a claim for mild asbestosis, or some kind of pleural disease.

So, the problem is real. The problem identified by Judge Jack is here in this Court, represented in this Court, being pursued in this Court. Something has got to be done about it. We have tried to craft a way of doing something about it. We did so, in fact, before Judge Jack ruled, and it's been our approach all along. And this is a flow chart that then carries directly to the questionnaire. What do we do? We take the three basic problems, unreliability or fraudulent medical data, unreliable exposure data, unreliable diagnosis. Under unreliable medical data we get B reads and PFTs. What did Judge Jack do? She said, with respect to this

data, there has to be scientific reliability. There has to be a Daubert analysis. What do we say? Daubert applies.

With respect to the B reads, she says, B reads conducted in mass screenings do not follow ILO guidelines and -- as many positive diagnoses as possible. They must be performed in an unbiased and reliable manner. What do we do? And I'm going to dissolve all of the -- you know, this kind of hand wringing about the science, and how complex it is. We don't have to get very complicated at all. We've got two things. Two things. One is that the ILO methodology, that is how you read these x-rays, is published. There are standards, and standardized publications that are in black and white. And to solve the problem of bias and the machinery that's been created, get them read independently. That's what our approach is. We say get -- follow the standards and get them read independently, and then the data is fine. It's fine. What does the published methodology call for? It calls for multiple B reads for independent readers, people who don't have a financial stake or connection with the claimants' firms. How important is it to get multiple B reads? I don't want to take up too much time, but basically we quoted the ILO guidelines themselves. They have to be repeated readings, at least two, but preferably more readers, each classified all radiographs independently.

What about the PFTs, the pulmonary function tests?

This is also very easy because, again, there are standards that spell out exactly how the test should be administered. You already know that you go into the doctor and you blow into the tube. You've got to get it all out. They make you go huhh, get it all out. That gives you a profile. The profile looks something like this, where you're expiring all that air. But you have to do it three times. They make you do it thee times, even though you don't want to. And the fact of the matter is the machine then generates the curve. And these curves can be read. They can be superimposed to find out if there really is a reliable test being done. And the standards spell it all out. So, we say there should be -- there should, in fact, be these PFTs.

We also say that to deal with the problem of unreliable exposure data there has to be a complete work history. And to deal with the problem of unreliable diagnosis there has to be an independent diagnosis made on reliable data. Now, if a claimant chooses to do something differently, that is they want to submit good old Dr. Harron's B reads, they want to submit the good old-fashioned stuff. They want to argue the good old-fashioned standards, and they don't want to comply with any of this, that's fine, and our form says you can submit anything it is that you want. All we're saying is that from our point of view these are the arguments that we're going to make. And if you want to comply with what we believe to be the

required standards, this is what you should do. But nobody is prevented from submitting anything that they want in response to the form.

So, where does that all bring us at the end of the day? It brings us to the questionnaire which tracks exactly the same flow. And I've got listed here B reads, that's handled in part two and seven. PFTs, part two and seven, exposure data, part three, sections A and B, and then the diagnostic information, as well. We have trimmed down this claim form, not claim form, this questionnaire, to be directly tailored to exactly the diagnostic and exposure evidence that's going to be critical in evaluating the value of these claims. We have followed -- followed Judge Jack's opinion. It's almost identical to Judge Jack's opinion. We've had it out there for three years now. It's the same stuff, because it's driven by exactly the same problem.

How will that, then, translate into an estimate? It will translate into an estimate because once we take a look at the claims here, in 2001, draw a line through what we believe to be the claims that do cast these basic standards, that will give us a benchmark against which we can then back pass to find out what the exposed population is following the traditional epidemiological models, and then forecast on the same basis. At that point your forecast is driven not by the fact of a claim, or filing a piece of paper that comes out of this gin

mill of paper, it will actually be based upon scientific and medical data. That's what you then estimate on the going forward basis being the value of the claims. And we reduce the uncertainty, and we know how much money there is out there to be paid.

I want to touch on one issue, which is the law, and then go to the CMO, because the CMO, I think, is a little bit simpler than the CMO issues that we faced in connection with the property damage claims. One issue is impairment. They say, well, you know, it may be. They don't say this, but even if you were to assume that all of the data has to be done in accordance with the methodologies. What good is it going to do you if one of the uses of the data is to show absence of impairment? But, in fact, even plaintiffs who aren't impaired still can recover under state law. In other words, they'll say even if all the data is reliable, people who are not impaired still are entitled to recover under state law, and we can't change substantive state law. And the answer, and this is the point they make here with respect to the PFT, a finding of impairment supported by a PFT -- you know, gold-plated PFT is not required under state law to show compensable injury. And the fact of the matter is that that's a claim that's been out there for a while, but time has caught up with it. There are several states that have now enacted legislation requiring asbestos claimants to establish, to demonstrate physical

impairment. Florida, Ohio, Georgia, and Texas all have changed their law so the state substantive law is now no longer supportive of their position. In addition, you have Courts that have adopted inactive dockets, or similar processes for unimpaired claimants. And that, effectively, accomplishes the same thing. You can't pursue the claim until you're impaired. So effectively, you don't have a claim for an unimpaired injury. What is the potential impact? And we can find for every claimant we know where they reside. We can determine what state's law is going to apply. What is the impact of just this issue of impairment, where we know -- because we can read out their PFT scores, who is impaired and who is not impaired, just right off the bat. Just in the four states that have asbestos tort reform, for all pending pre-petition P.I. claims, and then for pending and closed, 40 percent of our sample comes from states which have not enacted this tort reform. It's a huge impact. What if you include not just states that have enacted tort reform, but states that have adopted inactive dockets and the like. 60 -- almost 60 percent of the claims will be affected such that we believe that absent a PFT properly done, showing impairment, they have no right of recovery in those states to date. Again, an enormous impact.

Then we come to the point -- another legal point that they make, saying, gee, this decision, or what the -- what Grace wants you to do is contrary to the law. It's not been

adopted in all these other cases. And I think that the answer is actually exactly the reverse. The first thing that Grace has done is to follow the Code. What does the Code say? It says estimation is a contested matter. Because it's a contested matter the Rules of Evidence apply. They assert that there is nothing about estimation that has anything to do with Daubert, again, a farcical position. The Federal Rules of Evidence incorporate Daubert. Estimation as a contested matter must comply with the Rules of Evidence, including Daubert. Daubert is all over this case. They say -- we also say -- the Courts must apply federal procedural law, as well, again spelled out by the Code, and state substantive laws. So, we've got an approach that is absolutely and completely consistent with, indeed follows the mandate of the Code. We've been very careful about that. We have not sought to argue state law has to be trumped. We have not sought criteria for how to define diseases. All that we've said is that the Daubert standards have to be followed, and the data has to be reliable.

Now, against this backdrop, what about all of this conventional wisdom? I've got a conventional wisdom chart here. I just want to put it up on there.

(Pause)

MR. BERNICK: So you can see you didn't see that, or this. What's actually happened in the cases, and going back to the cases, the big problem is that they all are kind of coming

at related issues from slightly different perspectives. And it's very easy to pick out one part of the array and say, oh, gee, this is what the law is. I think if you isolate the variables in these cases, number one, the Courts are looking to different benchmarks in determining what the advocate liability is. On one extreme you have Courts that have looked to see, well, was the pre-Chapter 11 reserve taken by the company for the liability? Was it a reasonable reserve? At that point you look to historically what the company did, and ask whether it's reasonable. That becomes very relevant in the fraudulent conveyance case.

The next step up says, well, let's take a look at the pre-Chapter 11 settlement values. They may or may not be the same thing as the reserve. Let's take a look at pre-Chapter 11 liability, which is sort of the same thing as settlement values. What's the legal liability that arises from a pre-Chapter 11 litigation process? Then, differently, what about the litigation value in Federal Court, such as in a Bankruptcy Court? If we were to liquidate all of these claims, if this were to case were to go on for years, and we liquidated all of these claims in this Court, they would have a litigation value in Federal Court. We wouldn't send all these cases back to be determined in State Court. We would litigate them here, there would be Federal litigation Court values. And finally, you could also look down the road, say, well, the real issue is how

much is it going to cost to get rid of them, to liquidate them? How much will it cost for the trust to liquidate them, down the road, recognizing that many of them will be settled? And there you can look down the road to how much it's going to cost to settle and litigate the cases. These are all different benchmarks. And then there are a variety of different procedures that are available. Again, they cover a spectrum. You can have an estimation that's done where the estimation is essentially uncontested because everybody agrees to the plan, whatever the estimate is, they're all signing on to it. That's happened in many, many cases, that is, we've had uncontested estimations where pre-Chapter 11 settlement values by agreement have been used as the estimate. It says many -- and there are many cases that are like that. There's no real issue, and as part of the plan process nobody contests it. One step over it says we're going to have estimation but it's either -- it's not agreed to in terms of the final result, but the -- how it's going to be done is agreed to, or the Court says here is how you are going to do it. So, it is partly contested, but partly not contested.

Then you have a fully contested estimation where nobody agrees about anything. And the Court says, I am going to hear from you down the road at the trial, but in the meantime you get your experts, the other side gets their experts. You have discovery, competing estimates are

presented, including competing methodologies for estimation, and you have an estimation down the road. And then, finally, you have the approach that says we're going to litigate the question of what the overall value, or viability of the claims is through aggregative litigation. Now, obviously there are a variety of different cases. If we go to, let's say, estimation by agreed or Court-ordered procedure, in the A.H. Robins case, the alcon shield, the company's pre-Chapter 11 liability was determined through estimation, but there was agreement on the data that would be used for that estimation process, exactly how it would be gathered. And ultimately people came in with competing estimates. And, Judge, it's kind of very reminiscent of what happened just with Judge Fullam. One -- one estimate was, like, seven billion, another estimate was at 700 million, and then there was an estimate that was hanging around, 2.5 billion, which just happened to be the value that everybody expected to accrue to the sale of the A.H. Robins Company, and therefore, the value that would be available. And guess which value the Court decided to pick? It picked $2.5 billion. Were there a series of findings and determinations? No, because basically much of the process had already been agreed to. The question was what was the final ticket? The final irony of that was that that estimate was submitted by Francine Rabinovitz, who happens to have submitted exactly the same, or submitted an estimate in the Owens Corning case, which again

was picked because it was somewhere between the high and the low, without any explanation of why. But that was estimation where much was agreed to, pre-Chapter 11 liability.

By contrast, you have Owens Corning, Eagle Pitcher, and Federal Mogul. These are all situations where there was a contest about the estimate but much of how the estimate was to be done was not disputed. For example, in Federal Mogul they basically stipulated that pre-bankruptcy settlement values were going to be used for the estimation process. In Eagle Pitcher a database for pre-bankruptcy settlement values was used. There was an effort to expand the database, or to argue that somehow the more recent claims were more probative than the older claims. But everybody agreed that there was going to be the use of pre-bankruptcy settlement values, and Owens Corning, I am told, although I do not know, I am told that, in fact, in this case the Judge determined in advance that the estimation was going to be done using pre-bankruptcy settlement values on the theory that what had to be measured was not pre-Chapter 11 liability, and we say here he made just a flat mistake, he said it's got to be pre-Chapter 11 settlement values. And the error here is really fairly simple. Judge Fullam said that because state substantive law governs. You use the values that come out of the state system. Whereas, in fact, state substantive law doesn't necessarily mean the settlement values that come out of the very unique, and we would say broken State Court

process. Very different from Judge Fullam's decision is Judge Gambardella's decision recently in the G-1 case, where she flat out rejected the idea that these settlement values should be dispositive. She said she was going to rule finally on the issue down the road, but her footnote explains why these values are not really very useful. So, when they say it's all being done the same way, even where there's agreement, they're just wrong. What about fully contested estimations? Dow Corning II, which was the confirmation of the Dow Corning plan, was a contested confirmation proceeding, there was a contested estimation as part of it. And in that process the Dow Corning, and I put on this case in connection with the confirmation hearing, put on the estimate of the cost to liquidate claims post-confirmation. And it was adopted by the Court, and affirmed by the 6th Circuit.

What about litigation value in Federal Court? This is what we're arguing for here under the current CMO. It's also what USG is arguing for. No decision finally has been reached in that case. What about G-1, Judge Gambardella's decision? Well, she has yet to decide whether she is going to go this way, that is, Federal Court value, or pre-Chapter 11 value. She has yet to decide. But she has clearly -- that A, there's going to be discovery, B, both methodologies can be presented down the road, and that C, to the extent that we're talking about pre-Chapter 11 liability, she's already served

notice that she's not buying the idea of pre-bankruptcy settlement values. They actually quote the G-1 Holdings decision. Your Honor should read the G-1 Holdings decision. Judge Gambardella is basically setting up a situation where there will be a fully-contested estimation down the road, both sides presenting their evidence and their methodologies, and you know, it's a very thoroughly written opinion.

What about full litigation. Full litigation takes place in two contexts. One, you have full litigation where you have a fraudulent conveyance action brought challenging pre-Chapter 11 reserves. That's what happened in Hillsborough Holdings. It's what happened in the Sealed Air case in connection with Grace. And also, this is what they said on Babcock and Wilcox, even though they lost the Babcock and Wilcox case. What was the issue in the Babcock and Wilcox fraudulent transfer and conveyance case? It was the adequacy of the pre-11 reserves. To determine the adequacy of the reserves, we didn't go back and say let's now figure out after the fact what the real liability was. We had to say, as we did, that our -- our estimation methodology back at the time the reserve was set was a reasonable -- was a reasonable methodology. In fact, Judge Brown specifically disclaimed the idea that the rules that would apply to the fraudulent conveyance case would be the same rules that would apply to the estimation for plan purposes. Exactly the same distinction was

made by Judge Roland in the Sealed Air case. Because we were talking about the adequacy of a prior reserve, Judge Wolin was clear that the methodologies and the rulings that applied in that case and in that context were not necessarily the same thing as would be applied in connection with estimation as part of a plan processing. So, these cases had very little relevance to our process here.

What about full litigation? We have seen full litigation procedures apply to determine litigation value in the bankruptcy case in Armstrong, Rule 42 and Daubert were used on the property damages cases. We also applied exactly the same principles for our road map in Babcock and Wilcox, ultimately not ruled upon. This was also the proposal that we made, initially in this case, and in order to expedite the resolution of the issue here we've gone to estimation instead. This was also the proposal that was made in the first stage of Dow Corning. In the first stage of Dow Corning there were competing estimation plans. Judge Spector decided you could not actually estimate a disputed personal injury mass tort. So, what he said is that you've got to go to full litigation. let's bring on Rule 42. Let's bring on Daubert. That's exactly what we did before the District Judge. And as soon as that process got underway, guess what happened? The case settled. So, the idea of using full litigation to determine the aggregate litigation value in Federal Court on disputed

claims clearly has precedent. The silica MDL is full litigation techniques being applied to determine whether the claims do, in fact, have value in Federal Court?

What's the bottom line? The bottom line is that there is no such thing as a monolithic set of decisions, or a conventional wisdom, or a carved in stone standard for how to do this estimation. Each one of these cases is complex. Each one of the Courts has gone about things in somewhat the different way. We have argued for a process that we think will be expeditious, will follow the rules, and all that we're saying at this stage of the game is let them argue if they want that it ought to be differently. Let them if they want that it should be prior settlement values. They can make that pitch when we have the estimation hearing. But we are entitled to discovery. We're entitled to discovery in accordance with the Federal Rules. It is actually spelled out in the Code. And they can't rig the ultimate estimation by saying you don't get any discovery rights, or you don't get the questionnaire to be filled out. It just doesn't comport with the Code, and shouldn't carry us very long, which then brings me to the case management order.

The case management order that we propose is fairly straightforward. We say that the questionnaires basically can be competed in a 12-month period of time, the questionnaires that we propose to the Court. Now, what's very interesting is

they say in their brief, oh, my God, it's going to take years. Well, when I sat down with Mr. Inselbuch and Mr. Finch during the meet and confer, we asked how long will it take to get our questionnaire filled out, asked that question specifically, and the answer was four months. Four months. And remember, this is not a bar date, so in contrast to Babcock and Wilcox, we're not in a situation where people had to fill this out even to prosecute a claim. It's just a questionnaire for litigation purposes. They said four months. How long to do the database? Another three months. How long for the expert discovery? Basically from early October until May 15th. These are all the time periods that came absolutely, completely, and literally out of the meet and confer. Their own mouths. We said, okay -- where there was a doubt, I said, well, we'll use your time. You tell me the time. Now, they didn't agree to the questionnaires. They didn't agree to any questionnaires. But they surely agreed to these time periods, and we simply incorporated them into our CMO, which produces a hearing date of August.

What have they now done? Well, they said they got a different questionnaire, but they actually -- well, here's what they've done. They actually have proposed a CMO that looks something like this. That the order issues, there are expert reports, fact depositions, expert depositions, and the hearing takes place lickety-split on the first of February. Where's

the questionnaire? There's no questionnaire. There's not our questionnaire, there's not their questionnaire. There's no questionnaire. Where is our discovery? Where is our discovery of all of these different claimants in any way, shape, or form? It's not there. There's just nothing for it. So, we've now got a one-way street. They say we can run down our one-way street by February 1. That's what they say. Well, that's great. They can go run down that street, but that's their part of the case, it's not our part of the case. So, we actually talk about something else that they don't tell the Court, which is, well, what if their questionnaires were used? Now, we have said in our briefs their questionnaires don't do anything other than to repeat the same stuff that's gone into claim historically that has nothing to do with our discovery. Again, it's maybe their discovery that they would want us to do, but it's not our discovery that we need. So, we then said, well, okay, if we use your questionnaires does it really affect the end date? So, we then took how long it would take to get those questionnaires filled out. It wouldn't be done overnight. They basically said it will take about 45 -- what is that -- about 45, 60 days, whatever it is. It would take this period of time to get the questionnaires filled out. The database would then be compiled. It would be shorter. There would then be expert discovery, etcetera, etcetera. When would the hearing be? It wouldn't be August 1, as on our schedule. It

would be June 1. So, what's the real difference in these CMOs? 60 days. That is whether you use our questionnaire or their questionnaire, you're basically talking about an estimation process that convenes in the summer of next year. Now, that's real. That is, these were what we discussed at the meet and confer. And the bottom line is that there's -- there's disagreement about the questionnaires, but there's really not too much disagreement on what the sequence should be for the CMO, and how long the process should take. And yet they come in here and basically talk about something that was never discussed. It was discussed, it was mentioned, never agreed to. And they ignore the fact that they are themselves saying if there's a questionnaire it's going to take time. What are doing? So, we would argue to the Court that at the end of the day this is discovery. It is our questionnaire that drives our discovery, not them telling us what discovery we should get. It's going to take some time. It's not going to take materially more time than it would have taken for their questionnaire. So, we would ask the Court to order the serving and the filing of the questionnaires, and entry of the CMO, and I'm prepared -- if you'd like, Your Honor, to go through the questionnaire in whatever detail you feel is appropriate.

I suspected that would be the answer, so I'll turn it over to Mr. Lockwood, unless you have questions.

THE COURT: I actually did have one question about

it. I may have left it in my office. I noticed -- I may have left it in my office. I may have to go back and get it before we adjourn. I noticed something on one of the pages, but I apologize. Without my notes in front of me I just read so much this past weekend that I can't recall chapter and verse as to where it was. I thought that there was a time frame, I think, that seemed not to make sense to me, somewhere around page ten or 12, but offhand what it is I don't know, so --

MR. BERNICK: We have a copy here we can hand up --

THE COURT: All right. Thank you. Mr. Lockwood?

(Pause)

THE COURT: Thanks. I think what I -- somewhere or other I thought that some block was left off that needed an I don't know kind of answer. I believe that's what -- oh, you know, I think maybe, now that I look at this, it was in the property damage committee -- property damage form. I think it had something to do with has the building ever been inspected? Have there been reports of something? And there was a yes/no, but there wasn't an I don't know. And based on the fact that the building ages were so long, I thought maybe it needed an I don't know block. So -- I'm sorry.

MR. BERNICK: We'll check it out.

THE COURT: Okay. Mr. Lockwood?

MR. LOCKWOOD: Your Honor, I guess I should congratulate Mr. Bernick on the expedition of his presentation,

although he talked so fast I was having trouble keeping up with what he was saying in terms of being able to respond to it, but I'll --

THE COURT: There's that credibility factor again, Mr. Lockwood.

MR. LOCKWOOD: I'll do my best. I'd like to focus the Court initially on two things, actually, a comparison with Mr. Bernick's first slide about what he says Grace is not seeking to do with the P.I. claims, and the handwritten chart that he prepared in connection with Mr. Baena's dispute over the P.D. CMO, and the questionnaire. To start with the handwritten schedule on the board here, Mr. Bernick listed three categories of, in effect, legal rules that he stated, and I believe correctly have to do with the allowance and disallowance of claims in bankruptcy case, bankruptcy rules and procedures, the Rules of Evidence that applies to the determination of facts related to the claims, and the legal standards relating to the validity of the claims. And he first goes through how that would work out if you objected to the claims individually. And he listed some things that were specific to P.D. claims, but in terms of if you translate this into issues of personal injury claims, you would have a different set of issues as we heard in machine gun style fashion from Mr. Bernick earlier, there would be issues of diagnoses, and B readers, and pulmonary function tests, and

there would be Daubert issues with respect to those testing requirements of whether or not the plaintiff had or hadn't produced an expert, etcetera. And there would be whatever other issues relating to what Mr. Bernick's second slide referred to as the, quote, real, closed quote, liability. And what I take the word real to mean in that context is a Court-determined liability. And Courts determine allowance proceedings using the Federal Rules of Evidence, and the Bankruptcy Rules, and the -- and legal principles, and we've spelled that out in our brief, about how you initiate an objection to a claim, and that kicks off a contested matter, and who has what rights, and how you wind up ultimately under the Bankruptcy Code with a jury trial, if it's a personal injury claim, in front of the District Court.

Now, he says his second point is we can also do estimation of individual claims if, under Section 502(c) the actual litigation, objection allowance process would unduly delay the administration of the case. And again, that's true, you could. And indeed, as Mr. Baena pointed out, 502(c), by its terms, applies to the allowance of a claim by estimation. And while Mr. Bernick didn't get into it, it's perfectly clear that putting aside the Court's discretion to limit the amount of evidence and the extent to which you get into the merits of claims in an individual claim estimation, the basic principles of -- under the bankruptcy process of a right of an individual

claimant to contest the estimation of his individual claim, which would again be precipitated by an objection to the claim, would be essentially the same as it would be in an objection process. If you want to estimate my claim at zero, or $10, or whatever, you've got to give me notice. You've got to object to the claim. And then you've got to have a hearing of the contested matter, and proceed forward. And the only real difference between that and the objection process is that the Bankruptcy Judge can truncate to some extent, consistent with due process, and sort of reasonableness, the extent to which you ultimately get down and dirty into the absolute bottom line merits of that claim.

And then we get to category three, which is down here in the corner, which shows what happens when you deal with 4,000 P.D. claims, and all it says is estimation. But as explicated by Mr. Bernick, we're talking about a form of aggregate estimation, and he says, oh, that's the same thing as individual claim estimation, it's just streamlined. Well, to describe -- that description as facile hardly begins to do justice to it, particularly in the context of what we're here on today, which is this questionnaire.

First, of course, instead of 4,000 claims, which Mr. Bernick believes will be winnowed down to a couple of hundred through his objection process in the P.D. format, we have a 118,000 claims on the personal injury side. Secondly, instead

of a series of claims objections, where those claims' individual merits would be ruled on by the Court through the P-1 objection process, we don't have any of that here. Similarly, allegedly, at least, we don't have any P-2 process for estimating the individual claims. And indeed, slide one specifically says that Grace is -- what Grace is not seeking to do with P.I. claims is not asking for -- not disallowing claims, and while they profess to say that they're estimating claims, with all due respect, estimating a claim at zero, as opposed to estimating it at some fraction of a disputed value between the claimant and the debtor is the functional equivalent of disallowing it, because 502(c) specifically talks about the estimation being the allowance of the claim. So, if you estimate it at zero, that's what you get for that claim. And you're out here identifying, through a questionnaire, individual claims, named plaintiffs, asserted claim, valuing it at zero and asserting your authority for doing that in Section 502(c), that by hypothesis, by the rules, that claimant is entitled to be in Court, litigate with you, and if you litigate his claim at zero you've functionally disallowed it. But again, supposedly Grace is not going to do that here. They're going to estimate them in the aggregate. And they're going to streamline them. Okay. How do they propose to streamline them? Well, they propose to streamline them by sending out a questionnaire and then having experts. Beyond that, they don't

tell us how their experts are going to get from 118,000 questionnaires to their estimation other than to say, in the instructions to their questionnaires and in some of the argument that we've heard here today, that they expect the Court to make rulings that effectively say to people if you don't -- if your questionnaire demonstrates that your claims don't satisfy certain criteria that we, the debtor, propose, we will get the Bankruptcy Court, you, Judge Fitzgerald, to estimate that claim at zero, and we will -- presumably, since we don't propose to do -- have the Judge make 118,000 individual claim determinations, their experts, in some undisclosed fashion, are going to be able to group all of these claims and have you rule on, you know, grounds of 500, or 1,000, or 10,000, or whatever, at a pop. And a lot of that we heard about, you know, what Mr. Bernick's asserted results of his audits in Grace demonstrate, and Mr. Bernick's analysis of his audits in B&W demonstrate, which is all very nice, except that nobody ever had the opportunity to test any of that. No Judge ever passed on any of that. And that's just Mr. Bernick telling the Court, to use the Court's comment about credibility earlier, trust me, I've got a bunch of people. I reviewed all this stuff. This is my conclusions. And you should take my word for it and enter decisions in this case based on what I'm telling you my analysis was in those cases, which I think is, among other things, grossly inappropriate.

I want to divert a little minute here to Judge Jack's opinion, because both in their papers and in their argument the debtors have made a great deal of that. I want to start out by saying that I certainly have no brief as to defending or disputing Judge Jack's results in that case as it related to the silica claims and the -- and her analysis of the defects in those claims. I don't know whether the record was or wasn't complete. I don't know anything about it. But I'm not here to argue with what she did, and indeed, much of what she said I would agree with. But there's certain key differences about what happened in that case and where we are here that it's very important for this Court to focus on in connection with this questionnaire.

Judge Jack was assigned by the Federal Panel on Multi-District Litigation to pre-try -- pre-try 10,000 individual lawsuits. There was an initial objection to her subject matter jurisdiction from the plaintiffs because most of those cases had been removed from State Courts, and transferred to Federal Courts, and then transferred to Judge Jack's Court. Judge Jack decided to pass on the subject matter jurisdiction pending discovery, which she thought might bear on the subject matter jurisdiction issue, and also the basic pre-trial of the case. So, what you had, then, was approximately two years of case specific, plaintiff specific discovery in a pre-trial context of a bunch of cases which if she had ultimately had

subject matter jurisdiction she would have taken up to the edge of trial and then sent back to the transfer of Courts for trial under the applicable multi-district procedures. In the course of that pre-trial, as her opinion makes clear, Judge Jack sent -- allowed discovery from the defendants to the plaintiffs consisting of certain fact sheets, which are not in the record, but which the -- are not in this record, at least, but which the debtor analogizes to the questionnaire they are proposing. And among other things, in those fact sheets required the plaintiffs to identify their testifying experts, who they were going to put on at trial to demonstrate that they met the applicable burden of proof with respect to the demonstration that they had a silica-related disease. And it was in the context of evaluating those -- let me back up one second.

The plaintiffs, in answer to that, sent in documentation that identified the doctors in question as their experts. There's a footnote which indicates there was a certain amount of waffling on the plaintiff's part about exactly what kind of experts they were, but Judge Jack ultimately decided that they were testifying experts. Why does that matter? It matters because what Daubert does is it says that a defendant can exclude, under the Rules of Evidence and the principles of Daubert, proposed expert testimony at the trial of a case, if it doesn't satisfy the recognized principles of the discipline in which the testimony is being

offered. And it was under those circumstances that Judge Jack said wait a minute. To have a diagnosis in a trial of a disease you've got to have occupational history from the doctor who is going to testify. She made the further point, which is correct, that B reader reports are not, by themselves, a diagnoses. The literature is quite clear that all a B reader report is a report from somebody who has read a chest x-ray that has the purported expertise to be able to interpret that x-ray, which in many instances involves B readers because they are certified by NIOSH as having a particular level of expertise, but the much quoted American Thoracic Society guidelines, for example, that Mr. Bernick refers to don't even require that you have a B reader involved in a diagnosis. All it requires is that somebody who is competent, who could be a doctor who had sufficient training and experience in reading chest x-rays can read the x-ray report. And whether or not the fact that the doctor wasn't a B reader would go, in part, I guess, to the credibility of the doctor's evaluation, which the trier of fact would have to determine. But it's not a requirement, per se, to have a B reader, A, and B, a B read by itself isn't a diagnosis.

Now, what the silica people attempted to do, in effect, was to say either the B read was a diagnosis, or that the B reader had, in fact, made a diagnosis without ever interviewing the plaintiff, which she expressed extreme

disagreement with.

Now, let's talk about, before we get into particulars of all of the issues in the questionnaire, let's talk about where we -- what Mr. Bernick wants to do here. We've got 118,000 people that filed lawsuits that -- that named Grace up to four-plus years ago, these are the pre-petition cases that were filed. Since that time, all activity in those cases as relates to Grace has been stayed by operation of the automatic stay. So, we have no idea what the status of any of those cases is today. Some of them may have gone to trial. Many of them may have been settled. Some of them might have been voluntarily dismissed. We don't know. But we're going to send a questionnaire out to those people, and the questionnaire on its face in the medical procedure section asks them, you know, whether they were diagnosed, when they were diagnosed, who diagnosed them, and a lot questions about relationships between the diagnosing doctor and lawyers, and what have you, and similar questions about B readers, and similar questions about anybody that may or may not have had a pulmonary function test, and similar questions about anybody that may have had pathology. But absent from all of this -- well -- again, let me back up a second. Presumably, somehow or another, Mr. Bernick and his client, and his firm, and the experts are going to take these answers to these questionnaires, 118,000 of them, and they're going to go through and they're going to say these

people don't have any claims that are valid because of various defects. Some of -- they were from Dr. Harron. Or they were from some other bad doctor. Or whatever. But -- and they're going to say the Court should do that under Daubert. But until and unless those plaintiffs have identified any of those people as their testifying expert in a trial of their individual claim, this Court doesn't have any authority to apply Daubert because Daubert only addresses the qualifications of an expert that testified at the trial of the merits of a case. There's nothing in -- Judge Jack, among other things, didn't even decide, with respect to the claims that she castigated the plaintiff's lawyers and their doctors for having presented, she didn't even rule the claims were invalid. She reserved for another day the question of whether or not those plaintiffs, for example, might decide to go out and say, gee, she's disqualified Dr. Harron here, and Dr. Ballard, and she said a lot of bad things about how these screening operations were done, so, Judge, we'd like to go back, get my personal physician to take my medical history, get some B reader that, like Dr. Friedman, or Dr. Sigara, who Judge Jack seemed to think highly of, have them do a B read, and resubmit the claim. Maybe Judge Jack will permit that. Maybe she'll prohibit it on the ground, as she mentioned, a time for filing expert reports had passed. That's -- but that would be a matter of trial procedure. It's not a matter of the merits. But in fact, what

Mr. Bernick's proposal suggests is that in light of what Judge Jack said about all these doctors, and the screening operations that generated the claims, and the absence of personal diagnoses, etcetera, that all the existing plaintiffs and their lawyers, if put to their proof, as Mr. Bernick claims he has an absolute statutory right to do in this case under the Bankruptcy Code, if put to the proof of their claims in this case on a one-by-one basis, they would nevertheless tender Dr. Harron and a B read with no diagnosis from any doctor, and in circumstances where they would be able to prove, on a claim-by-claim basis that those claims suffered from the exact same deficiencies as the claims that were attacked successfully in the silica case. Now, I don't know, maybe the plaintiff's bar is as stupid as Mr. Bernick thinks it is. But I don't know how this Court could possibly assume that whoever might have been the initial B reader that the plaintiff used in him and his lawyer deciding that they had enough information to file a lawsuit, not to go to trial in the lawsuit, but simply to file a lawsuit in a State Court, he wants to, in effect, lock that information in as though it was trial ready. And the plaintiff is going to have to live with whatever bad choices his lawyer and he may have made five years ago in determining whether or not there was enough evidence of a disease to go ahead and file the lawsuit. I suggest to you that that is grossly inappropriate. I mean, if you're going to apply Daubert

standards to people, they should have the opportunity to prepare their case for trial and have the Court rule on the admissibility of their proposed experts at a time when the case is ready for trial. This isn't some process under which the Court is somehow or another making rulings which Judge Jack didn't even make as to what is the minimum amount of diagnostic quality that's required for somebody to file a complaint in the State Court in Mississippi, for example, where presumably there may very well be a very large number of the Grace cases that might have been filed in Mississippi because it's been identified as a jurisdiction where there is a lot of claims. In other words, this isn't a Rule 11 exercise to determine whether or not the plaintiffs in the cases filed against Grace had enough basis for filing their case at the time they filed it, which is really the only type of information that Mr. Bernick's questionnaire would elicit. Who was the guy that diagnosed you at the time you filed your case, unless the case has some or another gone to trial, and unless they expand -- they have asked, in the questionnaire, for every diagnosis you ever got, every pulmonary function test you ever had, every B read that you ever got, and every pathology test you ever got. So, for the cases that went to trial, however few of those there may have been, and the Court is well aware that relatively few asbestos cases actually ever get to trial. They're mostly settled or dismissed voluntarily, or -- some few

cases you might very well get the plaintiff's testifying expert. And I would suspect, since Judge Jack's view of what is required to have a diagnosis for purposes of a Daubert hearing at a trial is not something uniquely created by Judge Jack out of whole cloth for the silica litigation, and if you actually looked at the cases that went to trial you would find vanishingly few of them, if any, where the plaintiff only had a Ray Harron B read and a notation at the bottom, a la Mr. Bernick's exhibit that he showed you on the screen that said that the B read was, quote, consistent with asbestosis. I don't think anybody has ever contended that that level of information would get you to a jury in a trial at the end of the day. It might get you past, indeed, the -- from the absence of any cited authority by Mr. Bernick on the subject. One can assume that it would get you past a motion for summary judgment as to whether or not there were material facts in dispute, because generally speaking motions for summary judgment are made prior to the time that you designate experts and put your whole trial case ready to go. So, at the end of the -- no matter how bad -- what went on in Judge Jack's Court was, both from the perspective of the medicine and the lawyering, it doesn't really tell you anything about how this questionnaire is going to help this Court estimate a bunch of claims at zero by using Daubert, because, again, these are not -- you're not generating testifying experts on an individual

claim-by claim basis.

I don't know if the Court wants me to go through the questionnaire line by line, but I think, as an overview, it's absolutely crystal clear that the vast majority of the questions in that questionnaire involve the eliciting of facts which are relevant only to the individual claimants' claims. So, at the end of the day, putting aside all of the other issues that the claim form presents, what you've got is an extremely burdensome, extremely long, and the debtor's protestations about having reduced the burden of the claim form by the pages, a lot of it had to do with consisting of things like converting boxes to lines, to filling out answers, and to saying in four different sections of medical, and in several different sections of exposure, if you have more than one report, copy the page and fill it out for each report you got. If you had more than one job, and more than one job side, copy the page and fill that out. So, what purports to be an eight-page form for any of these workers, many of whom had multiple jobs in multiple job sites over the years, the actual form, when filled out with all of these xeroxed pages filled out, could very well run to 50 or 100 pages.

THE COURT: If they had that many jobs they're probably too old, and gone by now.

MR. LOCKWOOD: Well, Your Honor, a lot of these -- people like insulators and construction workers, I mean, Mr.

Bernick spent a lot of time trying to tell the Court that the only kind of people with a legitimate claim against Grace are construction workers. I'm sure the Court is familiar with the notion that construction workers work on a lot different jobs. And you could have been exposed to Grace products in dozens if not hundreds of different job sites.

THE COURT: Well, I guess --

MR. LOCKWOOD: And as for -- and moreover, they want information about your exposure to every other defendant's asbestos products, so either the job sites that you worked on where you didn't have exposure to a Grace product, you had to fill them out for exposure for Johns Manville products, or whatever. So, essentially, your looking at a filling out of a form that would have just a phenomenal number of pages, assuming -- assuming that the plaintiff had the ability to remember or otherwise produce that information. And as we pointed out in our brief, this exposure stuff is what Mr. Bernick and the plaintiff's bar, and the rest of us refer to by the shorthand a product I.D. And how -- how does the plaintiff prove 20 or 30 years later where he was exposed to somebody's product, and what the quantum of exposure was? And this also goes to this issue about, oh, well, dose. They claim dose doesn't matter. Dose, of course, matters.

Well, first, the plaintiff is a worker. He's not going to carry around -- he doesn't have a eidetic memory that enables him to remember every sack of construction material and the label that was on it, and or, if there weren't any labels floating around, he didn't have access to the invoices from the contractor to show -- that would show, in discovery, where the -- whose product it was and how it was purchased. In the real world, as we point out in our papers, product I.D. is proven through a variety of mechanisms, only one of which is the recollection of the plaintiff. Many of them involve co-worker testimony. They involve invoices. They involve records of the defendant itself as to where it shipped things. They involved customers. And they required the trier of fact to draw inferences about circumstantial evidence where there isn't direct evidence. Mr. Bernick's questionnaire and his arguments all sort of proceed on the assumption that, oh, product I.D., everybody knows all about that. The minute the plaintiff lawsuit is filed he's worked up the case. He's got all the stuff, so it will be a piece of cake for him to put in, quote, all documents that relate to his case. And, moreover, the questionnaire goes on to say that if you don't have all the documents you've got an obligation under a penalty of perjury clause that says I've found everything that's material to the claim to go out and look for the documents so that you can attach them to his questionnaire.

And again, to what end? At the end of the day, each plaintiff will have a questionnaire that will have anywhere from, you know, the eight pages simpliciter, to 50 or 100 pages, depending on how many of these forms they have to xerox to put the information in, and it will describe what? Only the particulars of his or her individual claim. And what are we going to do with that at that point? Not only is the case not trial ready, so you're going to get a lot of claims that says I don't know, or I don't remember, etcetera, but how do you get from the questionnaire to whether or not Grace is a, quote, real liability, closed quote, to that claimant. Your Honor said, in discussing with Mr. Bernick and Mr. Baena earlier, that you agreed that making categorical rulings about claim validity such as whether constructive notice was barred -- claims under statute of limitations sort of across the board on some global basis because everybody should have known per Mr. Bernick in 1984 that they should have started looking for asbestos in their buildings, that the categorical rulings of that sort would require -- would be an allowance issue for the individual claimants, and they'd have to have the right to come in and respond to that. Well, if you're making categorical rulings, for example, if you're being asked to, which I might add Mr. Bernick has cited no legal authority in support of. I mean, we've heard a lot of charts being flipped over about PFT standards, and American Thoracic standards, and ILO standards.

He hasn't cited any cases from any of the State Courts that tell you that, at the discovery stage in the case you have to have various types of results. He has cited four states that have changed their laws, and presumably experts could, without going through individual claims, using Grace's claims history, make some kind of identification of the percentage of cases that historically came from those states, and extrapolate the extent to which that would continue, or whether the plaintiffs, as they have done demonstrably, and as Mr. Bernick has pointed out in other presentations to the Court, when the law in the state gets bad, the claims migrate from that state and start showing up in other states under the state's venue provisions that permit that, to avoid the bad states. Why -- take Mississippi, for example. Why are all these cases coming from Mississippi in the first place? Now they are going to get knocked out because out of state plaintiffs will no longer be able to bring suits in Mississippi in car load lots by the device of adding one Mississippi plaintiff to the group. But why were they brought there in the first place? Well, they were brought there in the first place presumably, I don't know, Mr. Bernick doesn't know, but I -- I think that it's a fair presumption they were brought there for at least two reasons. One, there were -- the claims were from jurisdictions that had problems for the type of claim. I mean, Pennsylvania, for example, you can't recover for an unimpaired pleural case, so

maybe a bunch of Pennsylvania claims found their way to Mississippi to get around that. Another one is Mississippi is notorious for having very good verdicts in cases that went to trial. I mean, Mr. Bernick has cited, and others have cited that there were cases a couple years ago, some unimpaired cases went to trial in Mississippi got $50 million. So, that would be another case. Well, if Mississippi cuts off all those cases, does that mean that the cases which, after all, originated outside of Mississippi in the first place, just vanish? Or does it mean they're going to get brought somewhere else? And if they're brought somewhere else does -- are they going to be brought in states where they don't stay the cause of action by some incompetent plaintiff's lawyer? Are they going to be brought somewhere else where, you know, maybe they might have to work a little harder. Maybe they might get a little let favorable jury, might get less money. Whatever.

THE COURT: You're making a great argument for a bar date.

MR. LOCKWOOD: Your Honor, if you want to have 118,000 claims and have a contested 118,000 individual contested matters, you can do it, but I would come back to the notion where we started in all of this case, which is estimation. Why -- if this isn't a 502(c) estimation, and I agree with Mr. Baena, frankly, that technically I don't think this is, because we're not estimating the claims here for

allowance. If you read 502(c), it says, "We are estimating claims for purposes of allowance." Most of this estimation -- 80 percent of it -- is going to involve future claims. We're certainly not allowing the future claims, and the fact is that even with respect to the present claims where you could have some notional idea that you're talking about allowance, the fact is all of those claims are going to get sent to a trust unsupervised by the Bankruptcy Court, and the Trust is going to resolve them not allow them. An allowance is something that happens under the supervision of a bankruptcy judge pursuant to provisions in the bankruptcy rules and the Code. What the Trust is going to do with them isn't going to have a judge and bankruptcy rules and the Bankruptcy Code. It's going to have a TDP, a trust distribution process.

THE COURT: Well, of course, but the issue still is what is the predicted I suppose estimate of what those claims will be, at what disease levels, so that whatever plan is proposed make sure that it is appropriately funded. I mean you can put it in terms of feasibility if you want, but it's still a confirmation standard --

MR. LOCKWOOD: I agree.

THE COURT: -- and we still have to go through the process if you folks can't agree.

MR. LOCKWOOD: I agree. The question is whether you do that by simply, as Mr. Bernick derisively described, through

the use of experts without getting into a lot of the individual claimant discovery. Mr. Bernick has stated --

THE COURT: Well, I think there are lots of ways you can do it. I mean the settlement mystery model, everybody has -- not everybody. Some cases have used the settlement mystery model. It's readily accessible data within the debtor's organization, so it's out there. But does it really predict what future claims will be filed and how they will be allowed and at what levels? I don't know. I mean it's an evidentiary matter in every instance. Isn't it?

MR. LOCKWOOD: Well, again, we start out with one of the reasons that we're here in the first place on an aggregate estimation whether or not 502(c) is directly applicable is the proposition that everybody agrees -- unless Mr. Bernick wants to try and make good on his threat that he's actually going to try and go back and ask for a bar date and go through them one by one -- that trying to go through allowance of 118,000 claims would unduly delay the administration of this case, because you have to give 118,000 notices, and you have to have 118,000 contested matters, and --

THE COURT: I'm retiring in ten years.

MR. LOCKWOOD: Yes, well, I think I could safely predict at the time of your retirement in ten years you'll still have a pretty good docket of cases, particularly --

THE COURT: Employment for bankruptcy judges.

MR. LOCKWOOD: Judge, in fact, you should be able to send a lot of them to the District Court, because under 157 they're entitled to a jury trial.

THE COURT: Happiness.

MR. FRANKEL: Peter, we won't have the benefit of your counsel by then. Will we?

MR. LOCKWOOD: Well, I don't know. It's an interesting question. I'm getting a little long in the tooth.

THE COURT: But the purpose is not to figure out whether the current claims are allowable or not. The purpose is to figure out within whatever model you want to use or is determined to be used, that is a good predictive analysis to figure out how the claims are likely to be resolved through the trust when they're filed in the future.

MR. LOCKWOOD: I agree.

THE COURT: Okay.

MR. LOCKWOOD: And but lets think about that for a moment. Mr. Bernick's presented all kinds of statistics that he says this Court should accept for purposes of this questionnaire and CMO debate. I mean indeed he put in a whole lot of argument about the estimation. I mean he says 90 percent of the cases are now non-malignancy cases. If that's true, and it probably is true, you can look at the Manville database. You can look at the Grace settlement history. There is no reason to believe that all of a sudden the case mix in

terms of diseases is going to change a lot, so why do you need a bunch of questionnaires to prove that's something Mr. Bernick already knows. That 90 percent of the cases are non-malignancy cases.

With respect to the issue of individual PFT results and individual B reader results and that kind of stuff, Judge Fullam managed -- I want to say something, by the way, about Judge Fullam and what Mr. Bernick said about him. He mis-described what Judge Fullam did. The Creditors Committee in Owens-Corning asked for a bar date, and they wanted to get information about every individual claimant for precisely the same reasons Mr. Bernick was. They were in there arguing about bad B readers. And, by the way, Dr. Harron and Dr. Ballard and some of the doctors identified in Judge Jack's opinion, they were in the Manville audit that he talked about. That's ten years ago. Grace it -- he said -- he admitted in his pleadings Grace has precisely settled cases with B reads from Dr. Harron. The fact that -- I don't -- we haven't yet had the opportunity to take depositions from the Grace lawyers, but I expect that we'll hear the same kind of thing we've heard from Owens-Corning's defense counsel, Federal Mogul's defense counsel, which -- and, for that matter, in Babcock and Wilcox from the Worldwide Services Claims Handling Facility for Babcock that, hey, we knew about these questionable documents, and we knew about screenings. I mean screenings -- people have been

complaining about screenings for years. The original Stemple case he cites, and the tire workers case from 1990, that involved mobile vans running around screening tire workers.

The fact that the plaintiffs' bar has been ginning up cases by going out aggressively and finding people that they claim are injured is not something that has just come to light, no matter what Mr. Bernick wants to say about it. It's been known for years, and the testimony generally is, look, when we get these crappy cases, a big inventory, we conclude it's easier to settle a bunch of them for $200 a pop than it is to litigate all of them where, well, we might get rid of 90 percent or however many percent of them. We're going to lose a number of them, whatever percentage it is, and when we lose, we lose big, and it's going to at the end of the day cost us a lot more money. What Bernick --

THE COURT: But how is that relevant to what's going to happen in the future? You know, the concept that somebody is going to take a case in Mississippi because the juries are apparently more sympathetic, whether or not there is really liability of this specific defendant, you know, it's -- I guess -- or Missouri, whatever -- Mississippi, Missouri. Well, I guess under that law they have the opportunity to do it, but in the bankruptcy context what they may have is a contingent, disputed, unliquidated claim that needs to be litigated somewhere. And, yes, you can take a look the state law with

respect to whether or not they have a claim, but it still has to be liquidated. Now, it's going to be liquidated under the bankruptcy processes or trust processes, however, that's going to work out. Hopefully, people who are not impaired are not getting paid large dollars to come into the Trust and trial claims. And, you know, 118,000 --

MR. LOCKWOOD: Well, that's true. I mean that's why settlement values are used. We could in every one of these cases, Your Honor, say, look, settlement value -- we could say we adopt your crazy rule 408 position, and that settlements aren't admissible, and so what have we got to do look? Well, jury verdicts. Well, what's the -- well, there's only about, you know, 20 or 80 or 100 or whatever of them, and they're all over the lot, but if you average them out, sure, Grace will have won 50 or 60 or 70 percent of the cases. I don't know, a good -- much more than the voluntary dismissals in the settlement process. But the average price for both the cases that they win and they lose that arises from the verdicts they got and the ones that they lost is way higher and --

THE COURT: But, look, all you're arguing for, from what I can see, is this. If the debtor wants to produce its evidence based on one model, and you want to produce your evidence based on another, do it. I'll figure out which model has better credibility and makes more sense and doing adjudication. I mean that's what my job is. Yours is to

produce the evidence, the way you think it should come in, and my job is to make rulings based on the evidence you produce, and that's how we'll go.

MR. LOCKWOOD: We accept that, Your Honor --

THE COURT: Okay.

MR. LOCKWOOD: -- but this all goes back to the questionnaire, and what information they're entitled to seek and why they're entitled to seek it. They are asking for an incredibly burdensome questionnaire that can by definition -- the vast bulk of the information contained in it relates to the individual claim. If what we're doing here is an aggregate estimation, and we're not, as they profess, disallowing claims, and we're not asking for approval of a proof of claim -- I'll tell you their questionnaire is a heck of a lot more detailed than the Manville proof of claim form. I mean Manville didn't ask about who else's products you were exposed to or -- I mean it doesn't ask for any of this kind of stuff.

THE COURT: Well, we haven't gotten into that detail yet. I'm not sure that some of that stuff is really relevant. You know, it may be in that if a specific individual plaintiff knows that he or she was exposed to, for example, a Manville product and knows that for a fact for whatever reason, doesn't know whether they were really exposed to a Grace product, but has a reason to surmise that they were, yes, I think it's relevant to say yes, I was exposed to a Manville product. I

mean the debtor -- that may give the debtor some other discovery. It may give the other -- the plaintiffs other discovery.

MR. LOCKWOOD: Actually, the debtor hasn't explained why that -- what that discovery would lead to. I mean part of the problem is that when you read through their July 13th filing, and they discuss the rationale for various of their requests in the questionnaire that we've objected to, they say the Court doesn't need to address why we need this information. Just take it on faith that we want it, and we'll use it, and the Court will -- and everybody else will find out some time down the road whether it's helpful.

THE COURT: No, it has to be calculated to lead to relevant and admissible evidence. That's the standard, you know, and if it's not calculated to do that, it's not going to be discoverable. So, you know --

MR. LOCKWOOD: We agree with that. The problem, which Mr. Bernick has conflated in much of his argument when he talks about us saying they're not entitled to Daubert hearings, and they're not entitled to discovery, is what kind of -- what's relevant in the proceeding depends on what are the issues being litigated in the proceeding.

THE COURT: He's just being --

MR. LOCKWOOD: We would concede if they're litigating individual claims allowance. That a lot more of the

information that they're asking for in the questionnaire would be relevant. But if what they're litigating is what they're aggregate present and future liability and the future liability is likely to consist of, you know --

THE COURT: But at this --

MR. LOCKWOOD: -- 75 or 80 percent of the total, getting detailed specific plaintiff-only information from the plaintiffs --

THE COURT: But it may be relevant. It may, and I'm -- I'll give you one scenario at the moment. Let's say that in a particular -- at a particular job site -- that is a large job site, just for hypothesis purposes. Obviously, this has nothing to do with any specific case. Let's assume that there are 5,000 workers from a particular job site who file claims against Grace, and somehow all 5,000 of those people know that they were exposed at a particular time in a particular place to a Manville product, but none of them know that they were exposed at a particular time or a particular time or a particular place to a Grace product, I mean I think you can extrapolate from that that there will be a percentage of people in the future who will file claims that will not identify a Grace product but will identify somebody else's product, and that may be relevant evidence as to whether those future claims will, in fact, be allowed by a trust, which then tells you that there are numbers of claims that will come in that will be

disallowed -- again, in my, you know, perfect analysis, and, therefore, the Trust funding doesn't have to include those claims. That's the whole purpose. It's just to get to a bottom line.

MR. BERNICK: If I can raise just a point of process, we're now past the amount of time that I took, and I know that Mr. Lockwood was very cautious and said that he wouldn't take anymore time. He couldn't say that he wouldn't take more time than I do. I know that Mr. Frankel is also anxious to address the Court. I know that folks are interested in talking about exclusivity, and if we run into your 4:00 call --

THE COURT: It's five I believe.

MR. BERNICK: Okay. In any event, I really think that it would be good to know what it is that Your Honor really intends to cover today and maybe hear from other people, because all this is is just a rehash of what's in the briefs.

THE COURT: Yes. Look, my --

MR. LOCKWOOD: Your Honor, I --

THE COURT: My bottom line position is I think a questionnaire, to the extent that the debtor or the other parties want to do discovery is fine. I've said that before. You could do it by interrogatories. You can do it by questionnaires. There is really not much difference. Exactly what use this information will be to extrapolating the evidence to predict the numbers of future claims and at what disease

levels and what the compensation will be, right now I'm not -- I simply don't know enough about what that process will generate to know, but I'm not the expert witness who's going to have to look at that information and make that extrapolation. So it seems to me if that's the information the experts say they want and need in order to do whatever predictive analysis they're going to do so that they can testify and I can try to give you some rulings as to what those parameters will be, then we should do it. I think these questionnaires go a little far. I think it at some point we should sit down and do just what you said, go through them line by line and figure out what's appropriate and what isn't. You're not that far apart with some of the basic information. To the extent -- I understand you don't agree with the questionnaire, but to the extent that there has been a draft of a questionnaire, some of it's not that far apart. It's just that the debtor's goes significantly further than the Committee's.

MR. BERNICK: Your Honor, if I can address that just for a moment, so we can start to focus this thing, as I predicted, this is all about a negotiation that ultimately converges on the content of the questionnaire. They're saying it's not relevant, and it's not relevant. It's not relevant, and that then leads to and it's too burdensome, so we've got to cut back on it, and we're really now into an area where --

THE COURT: Well, but what they'll say, Mr. Bernick,

in answer to the question is I object, it's not relevant, and it's burdensome, and then I'm going to be right here making rulings on it anyway, so why don't we just do it and get it done?

MR. BERNICK: But that's exactly what it is that we've been trying to do. We have sat down for months on this thing. We've cut back for a very significant period of time, and I would just -- what I would be prepared to do is to have Your Honor actually go through the questionnaire, assume that they object to everything on the basis of relevance and burden -- assume that for a fact. They will -- they've already done that. They've already said that, but Your Honor has articulated the standard which is the discovery standard. If we had one of those claimants here as an individual claimant in an individual case, and we were to sit down and put that questionnaire in front of them and say we want to know all of the B reads, all of the doctors who did the B reads, all the PFTs, all the doctors who did the PFTs, and we want to know your entire exposure history -- we ordinarily do that by way of a deposition, I can assure you every single one of those questions would be asked. If you asked what -- you know, 50 lawyers sitting around a table wasting time. There is nothing that is in that questionnaire that is not absolutely mainstream, solid core discovery. It's apparent on the face of the questionnaire.

MR. LOCKWOOD: On an individual --

MR. BERNICK: No, excuse me.

MR. LOCKWOOD: Look, you interrupted me to begin with, Mr. Bernick.

THE COURT: Pardon me. Gentlemen. Gentlemen, I'm sorry.

MR. LOCKWOOD: Your Honor, I have --

THE COURT: Please speak to me not to each other.

MR. LOCKWOOD: Your Honor, please, I had the floor. Mr. Bernick is now launched into a rebuttal in the middle of my argument.

THE COURT: I'll hear you, Mr. Bernick, after I hear Mr. Rockwood. But, Mr. Rockwood, let's sum up. I understand your position. We're going to have a questionnaire so --

MR. LOCKWOOD: Okay. Let me make this observation, Your Honor. A couple observations. First, the question -- Your Honor made the comment, just before Mr. Bernick interjected, about what the expert wants to do with it. We've never had any showing from the debtor about what their experts want and why they want individual claim specific data for the purpose of rendering a report about the present and future aggregate liabilities of his client. We're being asked to take on faith the proposition that Mr. Burnick's client experts undesignated, un-affidavited, un-everything need this information to do this.

THE COURT: Well, if it turns out they didn't, then I'm sure that there will be some issues that you will be raising about credibility at trial.

MR. LOCKWOOD: Your Honor, one of the things that we haven't talked about here today, which is a big problem, is what happens to people that either don't or can't answer the questionnaire completely. The questionnaire instructions remain -- one part of them says the Court may disallow and bar the claim. Another instruction says it shall disallow the claim. I personally am of the view that Mr. Bernick validly hopes that half of the people or two thirds of the people either won't answer the questionnaires or will answer I don't know to a bunch of questions, and he will then come in here and argue that their claim should be valued at zero, because they didn't have --

THE COURT: Well, Mr. Lockwood, that's --

MR. LOCKWOOD: -- the information in their possession.

THE COURT: That's really in the future. I mean I don't know who -- what people are going to say. If they -- there may be reasons why people don't have any ability to answer the question. You know, somebody may have Alzheimer's and not even know that they have an asbestos-related disease. Those counsel or those people will surely have someone who will write down we don't know, and this is why we don't know, but

here's what we do know. They'll supply what they know, and they'll explain their reasons for why they don't. That I can't deal with at this stage.

MR. LOCKWOOD: Well, okay. Let's go to the next question, which is specifics of the questionnaire itself. Mr. Bernick has said that we don't agree on anything, and that's true in one sense that we don't agree that there should be a questionnaire. On the other hand, we have sat down repeatedly with him and pointed out the reasons why particular questions are objectionable, and he has essentially said you're entitled to your opinion, and I'm entitled to mine.

The question of how we are going to get to an actual questionnaire -- if the Court has, in fact, determined that, you know, (a) there will be some kind of questionnaire, the question of what kind of questionnaire is still a problem. We agreed in the CMO to a four-month period, because we were hoped that our constituency, even if confronted with 10,000 clients that had to fill this claim out -- this form out would do the best they could. But at the end of the day it's the claimant's responsibility to answer the questionnaire and the claimant's lawyer is going to have to deal with that. I hate to sound like Mr. Baena in this, but certainly, my committee isn't going to go out and answer questionnaires for people. They don't have the information even if they had the authority, which they don't. And you're talking about 118,000 people and the

potential for a whole lot of disputes and what have you, and at a minimum it seems to me we ought to go through the questionnaire with the Court at some point, so that the Court could have some idea of --

THE COURT: I already said that ten minutes ago.

MR. LOCKWOOD: Okay. Well, the question is is today the day you -- the Court wants to do that?

THE COURT: I don't know. I need to hear from everybody else first so --

MR. LOCKWOOD: Okay. Well, I'll sit down then.

THE COURT: I mean I'd like to get it done, but, you know, at this point whether it's going to be today or not I don't know. Mr. Frankel.

MR. FRANKEL: Good afternoon, Your Honor. Roger Frankel for David Ostern. Your Honor, I actually will be brief. The issues that are of concern to us are that the estimation trial we assume is an estimation of not just the claims of those that are getting questionnaires, but that we're going to extrapolate from that for the present unsettled claims, for the claims that have been filed or that are asserted after the petition date, and then, of course, the future claims. And our concern is, is that to the extent that the questionnaire is either too burdensome or imposes unfair penalties and results in a zero claim, for instance, that zero claim may be multiplied by five future zero claims that are

unfair, and so we think the process of how the questionnaire is sent out, what the questionnaire contains should be such that it is for an estimation of claims and not for a claims process itself or an objection to claim.

We have submitted with our brief on July 13th a proposed questionnaire. It is, as you might expect, simpler than the one that the debtor proposed. It is more pages than what the PI folks would want, but we think it's a fair questionnaire, so that experts can then do a study as to what present and future claims are, and we think that's really all that this is about. There are two suggestions that we have with respect to the sanctions or the incentives for not filling out a questionnaire or for filling out a questionnaire.

One of the, frankly, I don't think has ever been used before. At least folks here haven't heard of it, and that is if you fill out your questionnaire and you return it timely, then you go to the head of the FIFO queue, and while we don't have a confirmation order that could demand that, we certainly could put in the CMO that the parties will use their best efforts to cause that result. And it just seems like an easy incentive, so that people that throw the questionnaire back know that they're going to get something for that.

THE COURT: Well, that would have to be something that would then be incorporated into the TDPs. Is that possible?

MR. FRANKEL: Your Honor, I think if this Court orders the parties to use their efforts to do that, it is absolutely possible.

THE COURT: All right. I don't have any problem with that.

MR. FRANKEL: Because there is a FIFO queue that's going to be established anyway.

MR. BERNICK: What that's basically saying -- what actually turns out to be in most cases a pretty important item for discussion --

THE COURT: Yes.

MR. BERNICK: -- which is the FIFO queue we're now determining is going to be part of a plan kind of unconditionally no matter what else the plan calls for. Again, we'd be happy to entertain that type of idea, but the idea that somehow we can guarantee that at this point with respect to anybody seems to be a little bit farfetched. I'm not aware of any rule that enables the Court -- and I say this -- I'd be happy to do it, but I say this not understanding how the Court could have the power to define in advance as a matter of court order without soliciting the approval of all the different claimants that this particular provision is, in fact, going to survive no matter what else the plan says.

THE COURT: Well, I think you can say that the parties will make their best efforts to develop a TDP that will

put the people who have timely filled this questionnaire out at the front of the FIFO queue, and if there are classifications within which the Trust is going to take a look at claims, that they'll be put at the head of that classification. For example, if the Trust decides that it's going to deal with mesothelioma claims first because of whatever reason, then the mesotheliomas who fill out this questionnaire will go to the head of that queue. I think the parties can be ordered to use their best efforts. I don't know that I can guarantee it, Mr. Frankel, but using best effort seems fine.

MR. FRANKEL: Your Honor, I was not suggesting a guarantee. I think it's just an incentive that perhaps would help people get over the hurdle.

The other side of it is the stick, and there, Your Honor, we think that the most that should occur is that there would be the same kind of sanctions that would occur in a discovery dispute. In other words, if somebody -- if it turns out, for instance, that we have 90 percent or 80 percent of these questionnaires back, then that seems to me to be enough of a sampling for people to do their future study. To penalize the other 20 percent makes no sense at all, and I don't understand why -- although Mr. Bernick says there's no bar date -- the questionnaire says if you don't fill your claim out and return it on time, your claim is barred.

THE COURT: Yes, I thought I just heard Mr. Bernick

saying this wasn't to be an allowance process anyway.

MR. BERNICK: Well, I'd like to address that, and I appreciate --

MR. FRANKEL: Can I finish though?

MR. BERNICK: Yes. Well, I was going to agree with you, but that's okay.

MR. FRANKEL: I'll note he's agreed with me on that point. Your Honor, the other comments that I have really deal with the CMO itself, and it's the debtor's CMO, and I just want to be brief on it, but it's important, because these are issues that we talked about at the meet and confer, but it doesn't seem to have made its way into the final CMO that the debtor filed. Again, there is the forever barred issue with respect to the claims questionnaire. There is in Section 2B that the questionnaire is served on the official committees. I assume the FCR was left out inadvertently on that.

There is this concept of liaison counsel where they have the PI Committee and the FCR picking one or the other law firm to act as counsel in this, and I thought we had agreed that wasn't going to be the case, but it still is in the CMO, and I think we -- and I think I can speak for Mr. Lockwood -- object to speaking on behalf of each other's clients.

Your Honor, I do think the time frame that we are looking at is very similar, both with our CMO and the debtor's, and the real issue on the CMO and the time frame I think

depends on what questionnaire ultimately is sent out, and I will defer to Mr. Lockwood on how much time the plaintiffs would need once we decide on what questionnaire there is. Thank you, Your Honor.

THE COURT: Okay. With respect to the service issue, we hadn't really focused on specific portions of either the questionnaire or the CMO, but I agree that the forever barred issue should be taken out of the CMO if it's coming out of the questionnaire. It should be served on the Future Claims Rep, obviously.

With respect to liaison counsel, frankly, I think that to the extent that the current asbestos plaintiffs want to participate on their own, I should impose on Mr. Lockwood the same liaison function I've imposed on Mr. Baena. I don't see what that does to the Future Rep. You don't represent current claimants in any context, not a fiduciary capacity whatsoever. So I agree that the Future Claims Rep should be in this proceeding period, and I will talk to Mr. Lockwood about the other -- the liaison issue.

MR. FRANKEL: And, Your Honor, the only thing I was suggesting was the CMO process generally to get to the estimation hearing, we should be a party of that separate and apart.

THE COURT: Oh, yes, surely.

MR. FRANKEL: And with regard to present claimants,

we have no role in that.

THE COURT: All right.

MR. LOCKWOOD: Your Honor, with respect to your question about the liaison counsel, the Committee is perfectly happy to be liaison counsel in terms of actual participation by plaintiffs' counsel in the estimation sort of hearing process. The concern we have is being designated as liaison counsel for discovery disputes that might arise with respect to a questionnaire. I mean you're talking hundreds of plaintiffs' law firms. Each one of them could be getting questionnaires. Each one of them could be having disputes with the debtor about whatever --

THE COURT: Frankly, Mr. Lockwood, let me stop you.

MR. LOCKWOOD: -- and my firm really couldn't handle that level of --

THE COURT: Let me stop you. I think an independent person ought to be appointed for that purpose, and I think I have somebody in mind. So --

MR. LOCKWOOD: Okay. Thank you, Your Honor.

THE COURT: -- I think there should be a discovery focus that should not come to the Court first, and there should be someone who can attempt to fix that problem if it's fixable, and if it isn't, then you can come to the Court, and I've got somebody in mind, and I think that's an appropriate way of frankly both for you -- I don't know whether that's something

Mr. Baena cares so much about. There are not likely I think to be as many problems in the property damage side. No?

MR. BAENA: We've excluded -- we've accepted the designation, Your Honor --

THE COURT: All right.

MR. BAENA: -- for discovery purposes.

THE COURT: Okay. Thank you.

MR. BERNICK: Your Honor, I'll be very brief and focus I think on the remaining matter which is really how to reach closure on the content of the questionnaire and what the standard should be for that.

First just a couple small things. Mr. Lockwood has been at pains again to remind the Court that we're asking you to do something kind of on a wing and a prayer for one -- Your Honor has fairly said we'll see, and we'll judge the credibility when the evidence comes in. But what Mr. Lockwood hasn't addressed is how it can be that it's not just a question of what our experts have found in litigation, but Johns Hopkins University, which did the 19 -- did the 2004 study, the one that found 95 percent said abnormality, 95 percent of ours say no abnormality -- that's not me.

THE COURT: It doesn't matter, Mr. Bernick. I'm going to let you ask some of those things. If you're unhappy with the B reader, and you want to do further discovery, you can do further discovery.

MR. BERNICK: But the reason I say this is again this is -- basically gets down to the kind of a negotiation process with the Court over the content of that questionnaire, and every single question makes a difference. This is our discovery. It's not their discovery. Concretely though, what does the burden really mean, because this now has come down to a question of what standard should govern both relevance and burden in terms of the questionnaire? Remember this questionnaire, as Your Honor is well aware, is not just being served upon unsuspecting members of the general population. It's being served only those people who already decided to initiate litigation and all of the burdens that are entailed by the litigation. So the standard governing burden is the standard set forth under the discovery rules, and I have to say, Your Honor, I'm not aware of any case that I have ever litigated or somehow in any case it has not been -- it has been too burdensome to ask a plaintiff for their medical records and their occupational history. It is just absolutely basis stuff.

Not only that, but the fact that these lawsuits are old lawsuits is very important. They've now been pursued, some of them, for four, five, six, seven, eight years.

THE COURT: Well, let me suggest something that may make this a little less onerous and may add to Mr. Frankel's carrot. Why don't we add something that to the extent that these questionnaires are filled out timely and submitted,

they'll be used by the Trust for purposes of looking at the distribution when there is a plan that's confirmed?

MR. BERNICK: I have no problem with that whatsoever.

THE COURT: And so then, folks, if there's additional information, you all -- you know, you're all part of trusts in many other cases. You know what information trusts are generally going to want. Let's just make it possible, so that we don't -- they don't have to do it again.

MR. BERNICK: They do it right this time, I would say that they don't have to do it again. It is more -- we were talking about again when they're saying it's too burdensome, what does that mean. These forms are not going to be filled out by claimants. They're going to be filled out by their lawyers.

THE COURT: Well, maybe, but they're going to have to be --

MR. BERNICK: Your Honor, they will be filled -- it is absolutely a mortal certainty that they will be filled out by the lawyers as to what --

THE COURT: Yes, but the information is going to have to come from the plaintiff. My lawyer wouldn't know where I worked 25 years ago.

MR. BERNICK: No, in part, that's true, but overwhelmingly it's not -- that's not how these cases are pursued. And in an ordinary litigation if a plaintiff didn't

remember, the interrogatory imposes and obligation on the lawyer to make reasonable inquiry. That's what the rules say, so you can't --

THE COURT: But you're not --

MR. BERNICK: You can't --

THE COURT: But this isn't litigation of the individual claim. It is not a total parallel.

MR. BERNICK: Well, but here's where I'm going, Your Honor. Is that when it comes to burden, we are not talking about burden on an individual claimant. We're talking about burden on the lawyers who represent them and have the obligation to satisfy any and all discovery requests.

THE COURT: Well, Mr. Bernick, if the lawyer already has that information in file, then I agree with you. If the lawyer doesn't have it, then the lawyer's going to have to get in touch with the claimant.

MR. BERNICK: Yes.

THE COURT: And it will be a burden on the asbestos plaintiff, but so would filing a proof of claim and attaching any documentation that would be necessary --

MR. BERNICK: All that I want to avoid, Your Honor, is somehow that this is really an extraordinary imposition on the claimant. It's not. It's an imposition on the law firm. And number two, the law firms are not going to sit there and hide behind the claimant say, well, gee, my claimant doesn't

personally know, and, therefore, I don't have to tell you the answer to the question, and whether lawsuits are pursued is they're pursued by law firms that aggregate information for purposes of prosecuting the claims so --

THE COURT: But you're not looking at this for allowance purposes.

MR. BERNICK: Your Honor, this goes back, and it's exactly the same proposition. The only way to value -- we're not seeking to penalize the plaintiffs. From our point of view, if they don't fill out the form, Mr. Frankel is exactly right, we don't care. It doesn't make any difference from our point of view. We're not going to seek to disallow the claim. Notwithstanding all the suggestions, we're not going to seek to limit the claim. We just want to know the information for purposes of the estimate, and the estimate -- the basis for the estimate is the merit of the claim, period, end of statement.

Now they may say no, we're going to violate all the rules and use settlement values. Our position is that's not right, so in the same fashion as for PD this estimate will be driven by merits information, and our only way to get that information is this questionnaire. So you're talking about the lifeblood of the evidence, and the evidence is all that can be considered.

So, Your Honor, I would say -- and let me add one more thing to the mix here, because I'm going to come to a

proposal here in just a moment. We're talking about claim forms or a questionnaire is being filled out by counsel. They've already told us -- they represented to us, and they didn't deny it today, they can do it in four months. Their questionnaire takes a month and a half. Our questionnaire takes four months in a case that may be worth hundreds of millions or billions of dollars, and they are pursuing -- we're only talking about people that they already represent to take that extra --

THE COURT: Mr. Bernick, I've already said we're going to do a questionnaire. We just need to get down to the specifics.

MR. BERNICK: The last -- last thing. Last thing. Your Honor, has, as we have now here, a fraud problem in this case. There's a fraud problem in this case. We can't get around it. For them to say that somehow this is too burdensome, and we can't conduct a discovery that we need with respect to that fraud is absolutely outrageous, so here's my proposal.

We have spent weeks and months -- the whole purpose of being here today was not to have this whole discussion about whether there should be a questionnaire. It was a talk about the questionnaire and the CMO. They've had the opportunity. They've had the opportunity to go line by line. They've submitted briefs that virtually go through line by line even

though they want to preserve -- pristine their position that there should not be a questionnaire. I would like -- I would propose that Your Honor take a look at these -- at the questionnaire, and based upon the standard that applies, which is the Federal Rule Standard of Discovery, even considering the fact that this is an estimation, which, therefore, means it's streamlined, not different but streamlined, and considering what are the burdens associated with this balanced against the fact that we have a fraud issue that we have to ferret out. Your Honor, take a look at that questionnaire and give us your reaction to what it is that you think about that questionnaire. To invite another round of briefs --

THE COURT: I'm not doing anymore briefs, Mr. Bernick. My goodness.

MR. BERNICK: Okay. So if it's appropriate to come back here like next week or another day, I'd be happy to do it, but really I would submit, Your Honor, that this really is something that can be judged at this point with all Your Honor knows on the face of the questionnaire. We worked very hard to keep it focused on just these issues, and the only reason that I drew this little chart is that there's all this atmosphere of mystery. If they don't have B reads, they cannot establish -- they will not be able to establish fibrosis for purposes of saying that they really have an asbestotic condition, and they won't be able to establish that they have an asbestos-related

lung cancer. You can't have an asbestos-related lung cancer, unless you have some significant element of fibrosis. So they lose out on this just like Daubert on the dust sampling and the air sampling. If they don't have this -- and we're not saying they're locked into what it is they had four years ago. We say go get it now. We invite them to get it now. If they don't have this, these claims disappear. You press a button. They're not disallowed, but for estimation purposes you're doing a projection of what ultimately would be allowed or disallowed. You press a button. They disappear. That's not very complicated.

With the PFT, if they don't have PFTs properly administered showing four vital capacities of the appropriate levels, they can't get, in our view, compensation for asbestosis in the key states that matter. So this is not a question of a lot of judgment and a lot of speculation. The whole idea of the questionnaire was to ask for the hard data. The hard data can be put on -- in a spreadsheet. We can see what it is. You can say that 75 percent, 60 percent -- if you believe Mr. Lockwood's representations to the Court, 90 percent of these claimants are not going to have malignant disease, and we're talking about 90 percent of the claims. In our view, it's unlikely that 10 or 15 percent of them will have properly read B reads. Indeed their papers concede that. We will get this all sliced and diced and hard data that we don't even have

to argue about, and it's so simple, but you --

THE COURT: But the problem with the futures claims with respect to prior -- let me just say wrongdoing. I'm not making findings. Let's assume that there was prior wrongdoing with the past B reads.

MR. BERNICK: Right.

THE COURT: Certainly, that's not going to be happening in the future with respect to people filing claims against the Trust. Is it? I mean as somebody pointed out --

MR. BERNICK: But that's the whole point is that if until the -- that is exactly why we propose using this questionnaire. They now have an opportunity -- they can go out to anybody that they want to go out to --

THE COURT: Fine.

MR. BERNICK: -- and get the B reads properly done, and if they did it and, boy, they've got bigger percentages that we think, you know, we're hung by our own petard. No one is being locked into the past, but the past cannot be relied upon to tell us what the future is going to bring. That's the whole point of the questionnaire. And so, Your Honor, I -- you know, there's nothing more really for me to say in terms of the sanction that they don't fill out the forms. Whoever fills out the forms fills out the forms.

We're not seeking to allow or disallow, but the idea that somehow people don't fill out the forms, that we should

kind of back fill in and say, well, maybe their claims are really valid after all, come on. They're litigants. They have the opportunity to provide us with the information. That's why we did not work with a sample. We took the whole nine yards. We said everybody. So we're now going to see how many of these people if after years of litigating against other companies have the wherewithal to pursue just the basic elements of their claim. So we're very, very hypersensitive, Your Honor, I suppose you can rightly observe about negotiating on this questionnaire. It is so stripped down that as soon as you start to tinker with it on -- especially on grounds of burden -- there hasn't been a burden issue associated with medical records. When you start to tinker on grounds of burden, we are giving up -- they're giving up our case. Their case is easy. They pressed a button. You settled. You pay.

THE COURT: Well, I'm not concerned about the medical records. I mean surely they must have some medical records in order to have filed the case or at least gotten them into a litigation posture, and if they don't, they're not going to be able to prove their claim against the Trust without them anyway. I'm not concerned about medical records.

I'm more concerned about tell me every place you've worked in the past 25 or 35 or 45 years. I mean some people may not remember that. Every time you think you've been exposed to asbestos, okay, I mean people may have had jobs that

they don't think created a claim.

MR. BERNICK: If they don't know -- if they don't know, and their lawyers don't know, that's fine. They can state that. No one can make you know something that you don't know. On the other hand, if the lawyers had prosecuted claims against other companies at exactly the same sites for exactly the same occupations --

THE COURT: Yes, that should be stated.

MR. BERNICK: -- that should be stated.

THE COURT: I agree.

MR. BERNICK: And that's why we asked for the litigation history, because if they've been out there for four years, they likely have pursued claims against everybody they can possibly imagine.

THE COURT: All right. Well, maybe I misread the questionnaire. I didn't think you were asking who you have litigated against. I thought you were asking for other exposures by other products, and that's a different issue.

MR. BERNICK: But for asbestos -- when it comes to other products that could have caused the same type of ailment, like cigarettes, we do ask for cigarettes.

THE COURT: That's fine.

MR. BERNICK: But our principal focus on occupational history is if what they have got is just fibrotic condition, there are certain industries where it's very clearly

established that there are fibrotic exposures. We should at least know about that. But where we're most focused is on the detailed history of the asbestos exposures to other asbestos products, and that's why we asked for the litigation history, because by and large these people have been litigating for the last four or five years. They'll probably have made claims against every trust and every product that they can possibly think of, so their lawyers to fill out this form is again not like it's rocket science. They should already have in their database all of the different job histories for their own clients, and all we want to do is we want to know what that history is.

THE COURT: All right. I think we need to go through one -- you know, start with the base of the questionnaire. This -- we're not getting anywhere from this. I've heard these arguments. I've already said we'll do a questionnaire, and it's been another hour, and we're not any closer to developing what that questionnaire should be.

MR. BERNICK: Well, I'm happy to do it, but I'm also happy to make -- I don't know what other counsel think -- make the suggestion that Your Honor -- that it really be -- Your Honor has got the briefs, has got the questionnaires, and do we make a date to come back in the next few days and talk about it further? But --

THE COURT: Three weeks.

MR. BERNICK: What?

THE COURT: Three weeks. Remember? No emergencies.

MR. BERNICK: Oh, then we should -- then I hate to say it, but we should probably just do it today.

THE COURT: All right. Does anybody else have anything new to add with respect to these questionnaires or the CMO?

MS. DiLUIGI: Good afternoon, Your Honor. Brenda DiLuigi for the London Market Insurers. Your Honor, certain of Grace's insurers have submitted briefing on the PI estimation issues, and really we've done so just to clarify our position in that regard. As Your Honor is aware, we are -- chief among the insurers' concerns is the potential that any order that Your Honor may enter in connection with estimation may be despite whatever purposes for which it is being requested now may be misused in the future and in a way that impacts insurers' rights.

When we last appeared before Your Honor in January, you advised the insurers that although you did not want to and, in fact, would not be deciding insurance coverage issues, you were nevertheless not prepared to enter any order with respect to insurance neutrality in terms of imposing neutrality on a plan that you weren't sure was intended to be insurance neutral.

THE COURT: I hadn't seen a plan.

MS. DiLUIGI: And, well, Your Honor, I would just like to clarify that what we're asking for in terms of neutrality language or language to be inserted into the estimation and case management order is not insurance neutrality for all purposes. We are not seeking in any way a decree as to the plans treatment of insurance, and that, as Your Honor has stated previously, is an issue for another day, and we'll take it up at the appropriate time.

What we are proposing is that the case management order relating to personal injury claims for purposes of estimation include language that defines the scope of the proceedings and protects against later abuse in a way that would impact insurers' rights. And what we're proposing I believe is pretty simple. It's the language that has already been adopted by the Third Circuit in connection with Combustion Engineering, but it's --

THE COURT: That was a plan.

MS. DiLUIGI: But --

THE COURT: That was insurance neutral.

MS. DiLUIGI: Yes, Your Honor, and what we're proposing is not the CE language as it's drafted in the opinion, but rather the language tailored to relate to estimation proceedings only, so that it doesn't say anything about what the plan does and doesn't do and what the plan documents.

THE COURT: Look, everybody is going to be bound by these estimations, period, end of story. To the extent that the insurers have some creditor status, which I'm not aware of, then if you want to participate, participate, because you're going to be bound by the estimation findings. They will be binding. They're going to be incorporated into a plan, and everybody's going to have to live with those findings. So if you want to participate, participate. To the extent that the insurance companies are only trying to say that you're not bound, because this is just an estimation for Trust distribution purposes, and you'll figure out what your respective liabilities are after the Trust is formed and makes distributions, that's fine. I think you -- I think this process preserves that. But to say that the estimation numbers that I find are not binding on you is not correct. They will be. So if you've got an interest, show up.

MS. DiLUIGI: Your Honor, our concern is not that estimation occur in general, and that you'll issue an order, but rather that despite what the debtor is saying is now -- and the debtor has made various representations in the various briefings and court appearances about what estimation is intended to do on the one hand and what is not intended to do on the other hand -- and from our perspective we believe it would be appropriate to incorporate those representations into the order and have them find their way into the case management

order, so that everybody's on the same page.

THE COURT: Look, I'm in a procedural order, which is what a case management order is. I'm not making substantive findings. All I'm doing is setting up a process. I'm not going to give anybody releases or indemnities or assignments or anything else in a case management order. It's just a process.

MS. DiLUIGI: We understand, Your Honor, and so long as estimation is only being used, as Your Honor says, to determine the adequacy of the funding of the plan, that's --

THE COURT: And the likely claims that will be filed.

MS. DiLUIGI: Yes, Your Honor.

THE COURT: That's the purpose. Yes.

MS. DiLUIGI: Our concern is that the debtors may take Your Honor's comments and in the future attempt to argue for a UNR result against the insurers, and, you know, so long as --

THE COURT: That's a plan issue.

MS. DiLUIGI: Yes, Your Honor.

THE COURT: A UNR is definitely a plan issue. I've already said the estimation findings will be binding on anybody who is a party in interest. I'm not convinced that the insurance companies are parties in interest, but if you think you are, show up. They will be binding.

MS. DiLUIGI: Thank you, Your Honor.

THE COURT: Anybody else?

MR. BERNICK: I presume if they show up, Judge, we could explain to you why we think they should go back to where they came from.

THE COURT: Sure.

(Laughter)

THE COURT: Okay. Anyone else? Let's take a ten-minute recess, and then we'll come back and start.

(Recess)

THE CLERK: All rise.

THE COURT: Please be seated. Mr. Bernick.

MR. BERNICK: Yes. We've had -- we took the opportunity to recess to have a short conference. I think that Mr. Lockwood wants to address the Court on one matter.

THE COURT: All right.

MR. BERNICK: And then I have a proposal that I think we're all agreed to. It's a question of whether Your Honor would find it appropriate.

THE COURT: All right.

MR. LOCKWOOD: Yes, Your Honor. It's just a response to one item that Mr. Bernick said before the break, and then he will report on a proposal that we have jointly that deal with the questionnaire. One of the things he said in response to many of your questions about people who didn't have the information when they got the questionnaire was their lawyers could go out and get it for them. The point I would simply

make is that he's been spending a lot of time talking about the rules relating to discovery. What this questionnaire is is the functional equivalent of a set of written interrogatories coupled with the document production demand.

In the real world of Federal Rules of Civil Procedure, etcetera, when you get interrogatories and a document production demand, what you are required to do is give them the documents that you have and give them the answers to information that you have, and you're not required to complete the rest of your trial preparation in order to respond to the interrogatories. You may have to supplement the interrogatories, depending upon how they're worded, etcetera, and all I'm saying is that when you consider the proposal that we're about to make, that you keep in mind the issue about this proposal that you lawyers should be told that they can go out and get it. Thank you.

THE COURT: Okay. Mr. Bernick.

MR. BERNICK: I guess by way of response to that just in half a heartbeat, we're not saying that they have to go out and do anything. I mean if they want to continue to submit the kinds of information that have been the subject of a lot of discussion today based upon the Dr. Harrons of the world, no one's saying they can't do it, and that's always been the substance of the questionnaire.

The proposal that we have, Your Honor, is that one of

us think it would be overwhelmingly productive. Of course, we all enjoy it immensely, but overwhelmingly productive to prolong your days further by going through the questionnaire question by question. Our proposal is that -- if Your Honor is willing, that you would take the questionnaire back, read through it, and then through order I would suppose let the parties know how you're coming out with respect to what should be in the questionnaire. We would then ask for a week or ten days to submit any brief comments that we have where Your Honor's coming out, and then there would be a hearing. We would propose -- that is the debtors would propose that it be telephonic, so that we don't then simply -- I mean if it's in person, our own view is that we won't really accomplish an awful lot.

THE COURT: Mr. Bernick, I have you here. If I keep you here, we'll get it done today. I don't need anymore ten days. I've read through every single piece of paper that was delivered to me while I was at another seminar. We're going to do it today and get it done.

MR. BERNICK: That's fine.

THE COURT: So, folks, if you need another recess to go postpone your plane reservations, tell me now. I'll give you that recess. We're going to stay until it's done.

MR. BERNICK: Okay. There's only one other matter I think that's on the agenda which is exclusivity.

THE COURT: My view about exclusivity, unless you folks have a different view, is I'll continue it until the next omnibus, and I'll hear the arguments at that time.

MR. BERNICK: That's fine, Judge.

THE COURT: Anybody have an objection to that process, so we can get to this issue of the questionnaire?

MR. FRANKEL: That's fine, Your Honor.

MR. LOCKWOOD: No objection, Your Honor.

THE COURT: All right, then it's continued until the conclusion of the next omnibus hearing, and I'll your arguments then. Please put that like as the first contested matter, so we can get to it early if it has not been resolved by that time. Okay. Where do you want to start?

MR. BERNICK: I guess probably the best idea is -- I'm working with a current copy of the questionnaire -- is on page one and just go through it page by page, and I guess we should just give Your Honor a chance to look through it.

THE COURT: Tell me where the first objectionable phrase is, folks, and let's focus on that.

MR. LOCKWOOD: Your Honor, should we do this from our seats?

THE COURT: Yes, please.

MR. LOCKWOOD: If you compare, starting on page one of the instructions, the language on -- in the paragraph starting "The questionnaire is the official document," second

to the last, where it talks about, "failure to do so may have significant consequences including your being forever barred from asserting your -- receiving payment on account of your claim."

THE COURT: Yes, that should be stricken, and instead I think we should take Mr. Frankel's language that says, you know, we are soliciting this information now for purposes of estimating future liability. Your assistance would be greatly appreciated, and, in fact, if you fill out this questionnaire timely and as completely as possible, (a) we will do our best to get you into the queue in the TDP process wherever appropriate first in line, at the top of the list, however you want to state that, and (b) to the extent that you attach all of the documents that the Trust will need, you won't have to do it again. This information will be provided to the Trust, so you will have satisfied your burden. Something to that effect. You folks can wordsmith. Any objection to that?

(No verbal response)

THE COURT: Okay. Next, Mr. Lockwood.

MR. BERNICK: The only caveat -- well, I think we just have to work on it from a language point of view, but we can't leave them with the inference that, in fact, they will get paid. That is we can't do anything that sounds like if they fill this out, they are in some fashion assured of getting a payment.

THE COURT: That's fine. I think you can say that your claim will, you know, be evaluated for a payment under Trust distribution procedures which have not yet been approved. So this is not a guarantee of payment, but, you know, you will have to submit something to the Trust. If you submit it now, you won't have to fill it out again. Something along those lines.

MR. LOCKWOOD: We'll work on that. The same comment at little Roman at three of page -- of the instruction. I'm going through the instructions, because they're --

THE COURT: Mr. Lockwood, I can't hear you. I'm sorry. You need to --

MR. LOCKWOOD: I'm sorry. The same comment with respect to the language at the top of little Roman page three appears that any such holder -- the very first paragraph -- who fails to do so, boldface, shall be forever barred, estopped, and enjoined from asserting any such claims. That one isn't even a may. That's a shall.

THE COURT: I'm sorry. That one I'm not finding.

MR. LOCKWOOD: Page three of the instructions.

THE COURT: Yes, I'm on that.

MR. LOCKWOOD: The top of the page.

MR. BERNICK: It's on my page two at the bottom.

THE COURT: Okay.

MR. LOCKWOOD: Oh. Our printers must format

differently, Your Honor.

THE COURT: Yes. Okay. It's paragraph number five --

MR. LOCKWOOD: Yes.

THE COURT: -- in the instructions?

MR. BERNICK: Yes. We can conform that.

THE COURT: That's fine.

MR. BERNICK: Next.

MR. LOCKWOOD: Your Honor, on part two there's a -- beginning after the second paragraph there's a series of definitions of diseases, and then there's something at the end of it. The last one is called Other Asbestos Disease, and it says, "Any asbestos-related injuries, medical diagnoses, and/or conditions other than those above." Essentially what the debtors are doing here, as they justify in their papers, is creating their own definitions of not only what is a disease but what is a qualifying disease by building in both exposure requirements and diagnosis requirements into it, the result of which we believe is that something like 95 percent or more of all of the answers to the questionnaires will wind up describing other asbestos disease, because we don't believe, and certainly the debtors haven't -- I don't think the debtors would assert that most of the claimants would have two independent pathologists diagnosing mesothelioma or replicating B meters for their various asbestosis diseases.

I mean they might go out and get them if they were told that they had to get them, but I mean to some extent by allowing the debtor to put these diseases in there as though -- it puts a sort of a court imprimatur on the notion that somehow or another this is what is, in fact, going to be required in order for you to have a claim that's capable of being estimated, and we don't understand why you just can't have a more neutral description of the diseases. And then they've asked questions about whether they have these various reports and multiple pathology reports replicating B readers. And if they want to argue that for the people that don't have them, they don't qualify, they can do that without building in the requirement of having them into their definition of the disease in the first place.

THE COURT: Well, that seems fair. I wonder whether we can simply say something in this questionnaire like, you know, here are the diseases that are customarily diagnosed. Do you have one of these, and if so, what evidence do you have that supports it? Why not just do it as a fact, and then the debtor can categorize them however the debtor chooses if the evidence doesn't rise to the level the debtor thinks is appropriate?

MR. BERNICK: It's not -- it's really -- if we start to identify how -- what diseases often are diagnosed, that's the whole problem, is that what's often diagnosed are things

that we don't believe constitute any disease whatsoever. So --

THE COURT: But you are -- I mean you have listed them.

MR. BERNICK: No, because Mr. Lockwood made reference to it, but he didn't really I don't think refer the Court to it directly. If you take a look at F, the definitions are done. It says explicitly we can move this up front to make it explicit up front. These are the definitions that Grace will use in determining its own position regarding its liability.

And then it goes on to say, "All information, test diagnoses, and documentation should conform to the definitions," da, da, da, da. Then critically -- and we can underscore this, do whatever. "Information, tests, diagnoses, and documentation that do not conform to the definitions may be submitted," and we can beef that up, but we will assert in court that it should be given little or no weight. What we're really saying is we're being completely transparent. These are the criteria that we believe are required under the standards and Daubert. You don't have to meet them if you don't want to, but this is what you will be, in our view judged, by. We can, you know, your lawyers may disagree, in which case you can submit whatever you want, but the Court is not providing imprimatur for anything by putting this in the form --

THE COURT: All right. I think the sentence --

MR. LOCKWOOD: Your Honor, this was justified as

being a discovery questionnaire, i.e., asking questions. It's not intended to be a notice of Grace's litigating position to bar as a whole. If Grace wants to send out a separate notice to the plaintiff's bar telling them what their view of -- what you need to do to qualify to have asbestos-related lung cancer or asbestosis as a matter of law, they certainly can come to the Court and ask for permission to do that. Or, for that matter, they could probably do it without Court permission.

But this is supposed to be instructions on how to answer a questionnaire. Every proof of claim that I've ever seen in every bankruptcy case or trust procedure says do you claim that you have malignant mesothelioma, or do you claim you have asbestos-related lung cancer? It doesn't say do you claim that you have asbestosis or lung cancer with -- diagnosed on the basis of X and evidence of asbestosis on the basis of Y. And the questionnaire itself purports to ask whether you have those conditions, so it's a matter of the debtor putting one and one together and arguing the claim doesn't qualify.

THE COURT: Okay. I think that the debtor should amend the questions so that the questions simply ask for the facts not state the debtor's position. If what you would like to do is attach to the end of the questionnaire a position paper that you are going to advocate and have this information in it and say this is what you're going to advocate, but your advocacy hasn't been approved by the Court, the questionnaire

has, you may do so. I think the big problem is the sentence that says, "All information, tests, diagnoses, and documentation should conform with the definitions," because --

MR. BERNICK: We can change that. All this does is to short -- we could ask factually do you have a one, two, three, four, five?

THE COURT: Right.

MR. BERNICK: Do you have a one, two, three, four, five? We can do that. All it does is to make this thing longer.

THE COURT: It may make it longer, but if there's an objection in that respect, it's still supposed to be fact discovery.

MR. BERNICK: We'll then turn those -- all of these -- we'll turn them all into questions.

MR. FINCH: Your Honor, this is Nate Finch from Caplin and Drysdale. Just may I make a suggestion? The definitions in the Future Claimants Committee's questionnaire and the Asbestos Claimants Committee's questionnaire of the various diseases are neutral and taken basically from the same definitions that the Manville Trust uses.

THE COURT: All right. Does --

MR. BERNICK: They're not neutral. The Manville Trust is something that the plaintiffs' bar all agrees to. This is our discovery. It's not theirs.

THE COURT: This is the debtor's discovery. If the debtor turns these into questions related to -- eliciting the facts or the contentions to the extent that there's a contention issue, although this seems to be factually oriented, that seems to me to be appropriate. As I said, if you want to attach your own contentions to the end so that people know what it is that you intend to do with this information, just so you say that this is your proposal, it is not what's been approved by the Court, you may do so. Okay, so you will change into facts and circulate it to make sure that the questions are not objectionable. Next.

MR. LOCKWOOD: Under the heading Supporting Documents for Diagnosis --

THE COURT: Yes.

MR. LOCKWOOD: -- they -- the second paragraph purports not merely to ask for the document but to prescribe what the diagnosis must be.

MR. BERNICK: We will change that in line with what the Court has said. We will include the second sentence which defines what we will -- what we believe to be independent means. We will put -- to the extent that we ask questions, we will say to the extent the questions below ask you for whether the doctor is independent, these are the criteria. Now, I think that in point of fact, because we spell it out, that is we break out in the questions boxes that have them say did you

pay for the services, were you required to retain counsel, maybe we can just dispense with the whole thing. So --

THE COURT: Okay. Either --

MR. BERNICK: -- what I would say, Your Honor, is let's just take out --

THE COURT: The second paragraph.

MR. BERNICK: -- the second paragraph. I would also agree from the same point of view to take out the bolded language under x-rays and B reads. That bolded language we will work into a definition for purposes of asking the questions. Same thing with respect to pulmonary function tests.

THE COURT: All right. Fine.

MR. LOCKWOOD: The first sentence of the paragraph about x-rays and B reads purports to tell the plaintiff that if his chest x-ray reading is provided with a replicated reading, the chest x-rays themselves do not need to be attached at this time. The implication is if there is no replicating reading by the B reader, you have to supply the chest x-ray. Typically speaking, if plaintiff only has one actual chest x-ray picture, the plaintiff by hypothesis in this case has sued Grace but also may well sue a lot of other people. The chest x-ray may well be and frequently is necessary to bring the case against other people --

THE COURT: All right, then it can be --

MR. LOCKWOOD: -- and they in effect want them to turn it over to Grace and --

THE COURT: All right. It can be stated that the debtor has been permitted to ask for access to show it to a B reader or a doctor of the debtor's choosing.

MR. LOCKWOOD: Okay. I would just note the implication again that in effect what we're going to have is the debtors are going to take -- have their own B readers read 118,000 x-rays potentially and argue about them. I mean --

THE COURT: They may or may not. I don't know. I doubt that.

MR. BERNICK: There's a lot of different ways to slice it. This was an effort on our part to eliminate a cumbersome process. If they don't want to go through the process of getting an independent certification, then we obviously have to be given the right of access. I don't think we're going to be stupid in how we use that right.

THE COURT: Okay. I think you have the right of access, but having the chest x-ray copies attached might be too burdensome under those circumstances. So provide that you can have the access upon request, but the copies do not need to be attached. All right. Next.

MR. COHN: Your Honor, by telephone, this is Daniel Cohn on behalf of the Libby plaintiffs.

THE COURT: Yes.

MR. COHN: I don't -- I want to defer to Mr. Lockwood, but if he's done with the supporting documents section, I did have a couple of other comments on that.

THE COURT: All right. Go ahead.

MR. COHN: The first is -- and this really keys off of what you've just decided -- is that when there are original documents versus copies, that it should be made clear that the original need not be supplied, but in general that only copies need to be --

THE COURT: All right. It can say the questionnaire must be accompanied by copies of any and all documents. That's fine.

MR. BERNICK: Well, but with access to the originals.

THE COURT: With access to the originals. Fine.

MR. COHN: And then under -- on pulmonary function tests there is an issue even as to copies, which I understand the cost of that raw data that Mr. Bernick has requested -- and I'm referring specifically, Your Honor, to where it says in the first line actual raw data including all spirometric tracings.

THE COURT: Okay.

MR. COHN: My understanding, first of all, is that many, many clinics will not have even saved that. So that's -- but obviously, if it doesn't exist, then they can't be produced. But even as to those clinics that actually still have those underlying data, they will charge for it to be

supplied, and this leads to a broader question, which is that what is to be produced here I take it is that, as in any document production, is what is in the possession or control of the claimant, and that no one is being asked to go out and get something that they do not now have.

MR. BERNICK: It's the claimant and their counsel. I mean if we're going to play the game where we've got to go out and get medical releases and request medical documentation from doctors all over the country, that will effectively turn this process into individual claim litigation, and it will founder. Lawyers, to the extent that lawyers have the ability to access this information, they have an obligation to make reasonable inquiry under the rules, and they should obtain it. And particularly with regard to the Libby claimants, where they're basically all seeing the same guy in the same clinic, this ought to be a very efficient process.

MR. LOCKWOOD: Your Honor, I can't believe that we're being told that if Grace asks for documentation which is not in the plaintiffs' possession or the plaintiffs' lawyers' possession but in some of these third parties' possession, and they have to pay out of pocket in order to get it for the purpose of Grace using it and having their experts use it, this questionnaire could legitimately do that. I mean, again, Mr. Bernick tries to distinguish between its individual claim litigation if Grace has to out and do medical records review.

Apparently, it's not individual claims litigation if the plaintiff is forced to go out and get the same information at the plaintiffs' expense.

MR. BERNICK: To the contrary, I think in any individual case a court would require a plaintiff to produce their own medical information.

MR. LOCKWOOD: But this isn't an individual case as the Court has repeatedly stated.

MR. BERNICK: But the question is whether -- this is a shell game now. We want to know the basis of their claim. We want to know the medical data, and now they say, oh, well, gosh, don't get it from us. Go conduct discovery. And we say, okay, we'll go ahead and do that. In this case we'll bog down. The whole point of this matter is that these lawyers have access to their doctors. These doctors -- day in/day out they do business with them. In half a heartbeat they can get this information.

THE COURT: I can't see the --

MR. LOCKWOOD: Your Honor, there's nothing in the record to support these kinds of broad assertions by Mr. --

MR. BERNICK: Take a look at Judge Jack's opinion.

THE COURT: Pardon me.

MR. LOCKWOOD: Judge Jack was talking about a limited number of silica claims.

THE COURT: Folks, I am not Judge Jack, and this

isn't a silica case. Could we please concentrate, or you're going to be here all right. I, however, am leaving at five, and you are not leaving until I come back from my conference call in the event that we're not done. So can we please get to it? Mr. Cohn, it doesn't seem to me that this is an unreasonable request. If somebody is filing a claim or pursuing a claim against Grace based on the fact that there is a pulmonary function test that shows a disease, it seems to me that they have an obligation to produce either the results or the raw data. To the extent that they want to go to the doctor's office and copy the raw data, that's fine. But to the extent that there is an actual document, and they want to attach it, that's okay, too. They have their choice. They can either --

MR. LOCKWOOD: Either or --

THE COURT: They can go get it, or they can hand write it out or whatever they need to do, Xerox it, however it can be done. It's to be attached if it exists.

MR. BERNICK: Right, the tracings in particular. Those are the curves that are the --

THE COURT: I understand the tracings are necessary. That's probably the thing you want the most --

MR. BERNICK: That's right.

THE COURT: -- and it doesn't seem to me to be unreasonable as a request to get it when you're trying to

evaluate what the readings are and whether they're supporting for purposes of figuring out how many claims in the future are going to have those readings. So that's allowed.

MR. FINCH: Your Honor, should the debtor be ordered to pay the cost of getting that?

THE COURT: No, I don't think so. It seems to me if the claimant is filing a claim against Grace in a State Court suit, which is what most of these things are, based on a pulmonary function test, they're going to have to produce it at some point. They can produce it now. They won't have to produce it again for the Trust. They're going to have to produce it then anyway, and it will be their responsibility to produce it for the Trust not the Trust's.

MR. LOCKWOOD: I mean supposing the plaintiffs' position is that they don't have to have a pulmonary function test in order --

THE COURT: Then they won't have one.

MR. LOCKWOOD: -- to prove the validity of their claim? Shouldn't they at least have the option not to pay a clinic to --

THE COURT: If they have had a pulmonary function test, and their answer to the question is yes, I did, then I want a copy of the document attached. They're going to have to attach it for the Trust. It would be their expense anyway, and I've already said we're going to not make them redo this for

the trust. It's not an unreasonable burden. They're to attach it. Next.

MR. LOCKWOOD: In my copy it's at the top of page five. It may be at the bottom of page four on yours, Your Honor. It's the last paragraph under Asbestosis. There's another recitation of what the position that the debtors --

MR. BERNICK: Yes, we'll take that out.

MR. LOCKWOOD: -- will pay.

THE COURT: All right. The debtor -- as a general rule, the debtor is to take all of its positions out of it, so you can point them out.

MR. BERNICK: Right. If we're asking a question that assumes a definition, we have to provide the definition --

THE COURT: Exactly. Yes.

MR. BERNICK: -- but our position will not be in here.

THE COURT: All right. Next.

MR. LOCKWOOD: Now, under Asbestos Disease, the next paragraph where they talk about the documentation, "It says it includes supporting documentation exposing -- establishing exposure to Grace asbestos-containing products as a cause of the disease." I'm totally unclear as -- I mean in a trial where you have circumstances --

THE COURT: Well, that's coming out anyway.

MR. LOCKWOOD: Here. No.

THE COURT: That's a definition. Right?

MR. LOCKWOOD: No, it's under the definition of other asbestos-related disease.

THE COURT: Right.

MR. BERNICK: I'll rephrase it. "Any person asserting any other asbestos disease should include any -- any chest x-ray, pulmonary function tests, and supporting medical diagnoses and supporting documentation establishing that exposure to Grace asbestos-containing product had a causal role in the development of the disease."

THE COURT: Well, I think the issue is that the x-ray may not support that Grace's product had any role in it. It's just an asbestos disease. That's the problem.

MR. BERNICK: Well, but then they've got a big problem, because the point of this whole thing is that whatever you have got on Grace --

THE COURT: Right, so --

MR. BERNICK: -- come up with it.

THE COURT: So what it should say is it should stop after documentation, and then you should have a separate section that says, "Attach whatever documents you have that establish that exposure to Grace asbestos-containing products had a role in the development of the disease." It should be a separate question not part of -- necessarily part of the medical question.

MR. LOCKWOOD: Your Honor, if this question is directed to lawyers, that documentation could conceivably include the entire -- an entire case file -- deposition testimony. If you went to trial --

THE COURT: This directed to plaintiffs.

MR. LOCKWOOD: What?

THE COURT: It's directed to plaintiffs. The lawyers may have some of the documents in their file.

MR. LOCKWOOD: Well, I understand, but this -- the way -- if you go back and look at who this is told, and these questionnaires -- the lawyers for the plaintiffs are instructed to produce every document that they have that relates to their clients' case. So that if hypothetically -- Mr. Bernick made much of the fact that these cases have been pending for years against other defendants, so you could've had -- you could have deposition transcripts. You could have a ton -- you could have trial testimony for that matter in which --

THE COURT: All right, then make it --

MR. LOCKWOOD: -- exposure to Grace products --

THE COURT: Okay. Make it that any documentation or an identification of where that documentation can be obtained -- what it is and where it can be obtained.

MR. BERNICK: Yes, I mean we've run into this also with Mr. Speights who says, well, it's Grace, and then I've got 25,000 documents at my office. Come look at them. And I think

that where we are talking about law firms, the law firms still have an obligation to provide the information that relates to the claimant.

THE COURT: I agree, and so it should say related to Grace. You can put instructions in that say do not identify anything other -- that is not related to Grace.

MR. BERNICK: To the claimant and to Grace.

THE COURT: To the claimant's claim against Grace.

MR. BERNICK: Right. That's fine.

THE COURT: Fine.

MR. BERNICK: We will put that in there.

MR. LOCKWOOD: I'm not sure where that leaves us on -- I mean if you've got trial testimony that some coworker says, you know, this job site had a Grace product, is the lawyer whose work product that is required to produce it in response to the questionnaire?

THE COURT: That's their problem to figure out.

MR. LOCKWOOD: What?

THE COURT: That's their problems to figure out. Let them figure it out whether they're going to attach it or not.

MR. BERNICK: That's pretty easy. Where are we now?

(Pause)

MR. LOCKWOOD: Oh, I don't know whether Your Honor has already ruled on this in the course of our prior discussions, but in the industry code -- in D part three

immediately following the industry codes --

THE COURT: Yes.

MR. LOCKWOOD: -- there's a paragraph that says, "Please provide the requested information for the each --" I assume the is a typo "-- each side at which the you --" I assume the is a typo "-- were exposed to asbestos-containing products other than Grace products." We continue to object to the relevance of, in an estimation, Grace's liability of what individual claimants might have been exposed to other peoples' products. Your Honor gave me a hypothetical in which the claimant was exposed to Manville products but wasn't exposed to Grace products. If he wasn't exposed to Grace products, that's enough of a basis for Grace saying he doesn't have a claim against Grace. Establishing that he was also exposed to Manville products is surplusage at that point. On the other hand, if he was exposed to both, a Manville product and Grace product, under the outstanding law, that doesn't negate in any way, shape, or form Grace's liability.

THE COURT: I thought the question was being limited to litigation, if you've commenced litigation or engaged in litigation against --

MR. LOCKWOOD: No, that's the --

THE COURT: -- someone other than Grace.

MR. LOCKWOOD: Not in 3B, Your Honor.

MR. BERNICK: I think with respect to this group of

claimants, it will end up being the same thing. That's why we asked for the litigation. But Mr. Lockwood's hypothetical is just wrong. The test is it has to be a substantial contributing factor. If they worked at a Manville site for 35 years and then were exposed to Grace cement for a period of three months, that's not a substantial contributing factor. All we want to know is the occupational exposure history just as if the person were sitting there at the table.

MR. LOCKWOOD: Your Honor, Mr. Bernick is just misstating the law. I mean --

THE COURT: Look, folks. The answer is this. You may ask it with respect to litigation. If they have commenced an action against another asbestos producer, manufacturer, deliverer, or whatever, you may ask that question. If they have never -- if they have filed a claim against another producer other than Grace, you may ask that question.

MR. BERNICK: That's fine.

THE COURT: But with respect to providing all these information codes, I think that's going a bit far.

MR. BERNICK: Well, with respect to where they have initiated a claim or been paid a claim or initiated litigation, we absolutely do need -- we do need the codes there, because, otherwise, you can't tell that the nature of the exposure was. So all they have to do is if they worked let's say at five sites where they have made claims against different folks, they

just have to give us what was their job and what was -- ultimately what was the product to which they were exposed at those five sites.

THE COURT: That's fine. That's fair enough. It'll be limited to that, having filed -- pursued a claim or commenced an action.

MR. BERNICK: Yes, so that will define what we can ask for by way of sites --

THE COURT: Yes.

MR. BERNICK: -- and we have follow up questions that ask for the exposure.

MR. LOCKWOOD: Well, again we're -- at the moment we're just on the instructions, Your Honor. Paragraph H, part seven --

THE COURT: All right.

MR. LOCKWOOD: -- Supporting Documentation, this again talks about any and all documents that you and your counsel have or reasonably can obtain that support or otherwise relate to your diagnosis.

THE COURT: All right. We can --

MR. LOCKWOOD: That's incredibly -- and your exposure. That's incredibly broad and vague, both. The reasonably can obtain implies -- imposes the burden that we discussed earlier about going out and generating new information.

THE COURT: No, I don't think people have to go out to generate something that they don't already have. But again, as I said, if they attach it now, they don't have to attach it later. If it's something they're going to need to prove their claim later, it would be better for them to do it now, so they don't have to do it through this process later.

MR. LOCKWOOD: That may be, Your Honor, but the word must doesn't give them any discretion.

MR. BERNICK: It's you or your counsel. All we want is what they would have to do in an ordinary case if they were prosecuting a claim. They would be obliged to get the medical information. I believe Your Honor had already ruled on this about --

THE COURT: Well, you've already said on the medical information, but this is going beyond the medical. It seems to me, Mr. Bernick, that it would be fair to simply say that you or your counsel have, take out the reasonably can obtain, and make this a continuing duty. If something else comes up, then they have to produce it.

MR. BERNICK: Every one of these people is going to tell us, oh, we don't have it at our office. It's at the doctor's office, and we can't possibly get it. That's exactly what they're going to say.

THE COURT: Well, it seems to me that if it's the doctor's office, the doctor is the agent of the patient in this

instance just like the attorney is. That's clearly within the patient's custody or control if not custody.

MR. BERNICK: We'll make this easier. We'll focus it on the diagnosis and on exposure to Grace products. This is broader. It's goes exposure to asbestos-containing products.

THE COURT: All right.

MR. BERNICK: And I think --

MR. LOCKWOOD: Your Honor, this --

MR. BERNICK: -- it's very reasonable.

MR. LOCKWOOD: This or otherwise relate to, I mean it's one thing to ask for the document that the plaintiff wants to tender as supporting his claim --

MR. BERNICK: The rest.

MR. LOCKWOOD: -- the or otherwise relate to, I don't even know what that means. I mean that's incredibly broad.

MR. BERNICK: That's what it means in any discovery case. This is -- the relate to operative term is standard in any discovery process, so that we're not simply talking about what the claimant would like to refer to, but we're talking about the other things that relate to the --

MR. LOCKWOOD: Again, we're talking about this is as though it was an individual claims allowance. I mean this is an estimation. It's supposed to be streamlined.

THE COURT: It is.

MR. LOCKWOOD: What's streamlined about asking for

anything that might relate? I mean the word --

THE COURT: Folks, I've made a ruling.

MR. LOCKWOOD: -- relate is unbelievably. Everything relates to everything else, Your Honor. I object. When I get those kind of discovery requests, I always object to the term relate to.

THE COURT: Well, then they can object to it if that's what they want to do.

MR. LOCKWOOD: I get sustained regularly, because it's too broad and vague and undefined.

THE COURT: But the standard is going to be whatever they need to get through the Trust process that they can put in this now they don't have to do again. That should be a big incentive, and on top of that they'll get their claim treated first. That should be a big incentive for them to go out and get whatever documents that support this claim, so they don't have to --

MR. LOCKWOOD: I agree with that, Your Honor, but again --

THE COURT: -- do it again.

MR. LOCKWOOD: -- this uses the word must.

THE COURT: It says --

MR. LOCKWOOD: It says the questionnaire must be accompanied by it. It doesn't say the questionnaire may be accompanied by it.

MR. BERNICK: The Court has heard from Mr. Rockwood. This is the fifth time or sixth time he has made the argument. This is basic discovery rules. Your Honor has ruled on this repeatedly, and all he's doing is seizing upon the unfortunate opportunity that the same language has recurred again to reargue exactly the same point. Your Honor has ruled on this.

THE COURT: All right. I think this could be amended --

MR. LOCKWOOD: Your Honor, you haven't ruled on this.

THE COURT: It could be something like this. Documents that you, your counsel, or your doctors have, period. Take out the reasonably can obtain and make it a continuing duty.

MR. LOCKWOOD: Can we limit it to that support your diagnosis rather than or otherwise relate to? I mean, because again -- or find some debtor term than otherwise relate to. Your Honor, do you know what otherwise relate to means in the context of exposure?

THE COURT: Sure.

MR. LOCKWOOD: I don't.

THE COURT: Well, I know this. I know that if there's an x-ray that doesn't support the diagnosis, because it's negative, and it should be positive, that that relates to the diagnosis.

MR. LOCKWOOD: Well, okay. If they want to rephrase

that support or contradict or negative, but otherwise relates to -- I mean something relate --

MR. BERNICK: I'll be happy to do support or contradict.

THE COURT: Fine.

MR. LOCKWOOD: That's acceptable.

MR. BERNICK: And conflict with. Support or conflict with.

THE COURT: Fine.

MR. COHN: Your Honor, once again, this is Dan Cohn on the telephone.

THE COURT: Yes.

MR. COHN: I think that the addition of the word or doctor does not reflect the reality of the type of relationship that people have with doctors. They're not like lawyers where it is reasonable to expect that whatever the lawyer has in his file is owned by the patient, and the patient has the ability to produce.

THE COURT: Mr. Cohn, I've never seen a doctor yet who upon reasonable request and the copying fee doesn't produce a copy of the medical documents. So the plaintiff can get it, period, end of story. It's the plaintiff's information that's significant.

MR. FINCH: Your Honor, on the exposure documents, any time I see a request it says any and all documents. Some

of -- I mean Grace has been litigating and trying asbestos personal injury cases for 20 years. It's produced --

MR. BERNICK: Your Honor, I object. This is the exact -- first of all, it's other counsel speaking for the same committee. Second of all, it's exactly the same objection --

THE COURT: Please. Please.

MR. BERNICK: -- that was just ruled upon.

THE COURT: Folks, can we please just get through it? Go ahead. Finish your statement, so I can hear it.

MR. FINCH: There could be a warehouse of documents that Grace produced in prior litigation relating to exposures at job sites all over the country. You're expecting the plaintiff's lawyer to produce that, or can they just say tell Grace go look in your own document depository?

THE COURT: You can tell Grace to go look in its document depository if you identify for Grace where in the document depository it is. So it was filed in, you know, XYZ case pending in the Southern District of New York in document discovery production YZ. You can do that.

MR. BERNICK: Your Honor, what I agreed to do in the way of modifying this language relating to your diagnosis and your exposure to Grace asbestos-containing products, it's your exposure. So if they're going to refer to documents in our warehouse that deal specifically with this plaintiff's exposure, that's fine. I venture to say all that that will do

is be completely abused. If they really have documents that are that specific, the plaintiffs' lawyers have them. They have them in their possession.

THE COURT: They probably have, but if they've already produced them once, they don't need to produce them again. So if they can prove that they've already produced them, you can go back into your files and get them.

MR. BERNICK: Well, I think it's so simple. They've got the claim files for these people.

THE COURT: They do. Do you want to pay for the cost of it then? But if they've produced it before, they can send it again, but Grace will reimburse the costs -- the copying and mailing costs?

MR. BERNICK: That's fine.

THE COURT: Fine.

MR. LOCKWOOD: Your Honor, what this discussion demonstrates, in part at least, is that the plaintiffs -- individual plaintiffs that are trying claims against Grace based on exposure theoretically would have to get discovery from Grace about documents relating to their exposure, because Grace would have invoices. It would have customer lists. It would have information its files either in depositories or elsewhere that would show where Grace products went potentially. And one of the things that's totally unclear to me about how this process is supposed to work is that what

we've got is Mr. Bernick here describing all the information he needs, so that his experts can attack the plaintiffs' claims, but are the plaintiffs whose individual claims are being attacked here under the guise of an aggregate estimation going to be forced in order to rebut that to get discovery against Grace to try and find out what documentation Grace has that would help them prove up product I.D., which is also what goes on the typical case, as Mr. Bernick is fine with saying?

MR. BERNICK: That's pretty easy, because this is precisely the same argument that Mr. Lockwood's partner made to Judge Vance down in the Eastern District saying, well, we can't really tell what the product -- you know, whether there really was product I.D. until you tell us where all your boilers were. Tell us where all your boilers were, so then we can tell you who was exposed to them, and she said, no, these are people who all filed claims against Grace already. If they've got the information, they've got it. If they don't have it, they don't have it.

MR. LOCKWOOD: Your Honor, that was --

THE COURT: This is not an allowance process for the individuals.

MR. LOCKWOOD: But in front of Judge Vance it was.

THE COURT: Well, it isn't here.

MR. LOCKWOOD: She -- I understand, and that's why --

THE COURT: So they don't need to --

MR. LOCKWOOD: -- that vassal response about what Judge Vance said is not applicable in this case.

THE COURT: They don't have to defend against anything here if they don't want to come in. If Grace presents evidence through its experts and the committees evidence that is contrary through their experts with respect to the significance of the information that's being presented, that's what this is all about. It's not about adjudging whether a specific claim is allowed or not. Folks, come on. We've been doing this all day.

MR. LOCKWOOD: But, Your Honor, but bear with me a second.

THE COURT: I don't want to bear with you. I want to get through this, Mr. Rockwood.

MR. LOCKWOOD: I understand, but this is important. I mean it --

THE COURT: I know it's important. I've overruled it five times.

MR. LOCKWOOD: I don't know what you've overruled. We're talking about a questionnaire. We haven't even discussed that. I mean --

MR. BERNICK: Technically, Your Honor --

THE COURT: Mr. Bernick, stop, please. Go ahead, Mr. Rockwood.

MR. LOCKWOOD: Mr. Bernick is trying to put us in a

position in which through some combination of the committee and the plaintiffs they're going to wind up having to litigate against his experts who are going to say there's no product I.D. here, because the plaintiff didn't produce product I.D. --

THE COURT: The Committee has discovery rights.

MR. LOCKWOOD: -- and in a regular case the response to that is that the plaintiff would not only be able to produce their -- whatever evidence he already had, but he also would be able to get evidence from the defendant.

THE COURT: You have discovery rights. If you want evidence from the defendants, take them.

MR. LOCKWOOD: So that means -- and the question is how do we do that? Does that mean that the Committee --

THE COURT: Not through this questionnaire. This is the debtor's.

MR. LOCKWOOD: I understand, but I'm trying --

THE COURT: Okay.

MR. LOCKWOOD: Does the Committee have to act on behalf of the individual claimants who don't have product I.D. to seek discovery from the debtor that could substantiate the plaintiff's claims, or did the plaintiffs' lawyers individually have --

THE COURT: Mr. Lockwood, you're positing things we've spent the whole day talking about. You've already said you don't want to be the liaison for discovery matters.

MR. LOCKWOOD: Correct.

THE COURT: I've said I'm going to appoint a mediator for that purpose. That's what I'm going to do, so don't worry about it. If you want discovery, you know how to take it.

MR. LOCKWOOD: Okay, well, just let me then state for the record I object to a questionnaire that is going to be used by the debtor for the -- under the guise of estimation for having experts disallow claims based on the plaintiffs' inadequate evidence when the plaintiffs are not being afforded under any rules the opportunity --

THE COURT: Nobody is disallowing claims.

MR. LOCKWOOD: -- to get --

THE COURT: Your objection is overruled. This is not an allowance process. It's an estimation process. You have no standing to raise that objection, because, as you've told me repetitiously today, you don't represent the individual plaintiffs.

MR. LOCKWOOD: No, but I do represent them in the estimation, Your Honor, and that's what -- what I'm concerned about is that we're going to wind up with a very one-sided record here, and we're going to have a lot of information that the debtors are going to have gotten from the plaintiffs' via the questionnaire.

THE COURT: This is the debtor's questionnaire, Mr. Lockwood. It's not being used to for discovery by the other

side. You can do your own questionnaire. If you want to come up with one, or you want to go through yours, the one you've submitted in lieu of the debtors, if that's what you want by way of evidence, we'll go through it. If there's a different one you want, propose a different one. This is the debtor's discovery. Overruled. Please, let's go.

MR. LOCKWOOD: In the attestation instruction, part five, paragraph I --

THE COURT: I'm sorry. Part five?

MR. LOCKWOOD: Excuse me. Part eight. I miss --

THE COURT: Okay.

MR. LOCKWOOD: It's the second sentence. It says, "You are further attesting and swearing that you have not omitted any requested information, the inclusion of which would have a material effect on any right to assert a claim against the debtor's estates." I'm not aware of any provision of law that enables the debtor to have that sort of a jurat on a claim form or anything else.

THE COURT: I'm not either, Mr. Bernick. I think that needs to be stricken. If you want to put in a --

MR. BERNICK: I am striking it out as we speak.

THE COURT: All right.

MR. BERNICK: True and accurate is good enough.

MR. LOCKWOOD: Item J, part nine, second sentence.

THE COURT: Actually, I don't think that the claimant

has to fill this out by -- through their lawyer. Do they?

MR. BERNICK: Well, the lawyer -- the claimant has got to fill it out, and but then the lawyer also signs off, and that is absolutely critical.

MR. LOCKWOOD: I would note that in the normal interrogatory responses in the Federal Rules of Civil Procedure, Your Honor, there's no provision for having a lawyer sign his client's interrogatory answers.

MR. BERNICK: It absolutely blinds the realities of this litigation, and it's absolutely critical that we obtain the information. If you want to put your clients to the task of learning all that will be mounted in support of their claims, so that they personally can attest to it, that's fine. But generally speaking, we know exactly how this is going to take place. The clients will know relatively little. It's the lawyers that know everything, and it's the lawyers from whom we need the information.

MR. LOCKWOOD: So basically, Your Honor, we're in a situation in which every time Mr. Bernick wants some information he says it's required by the Federal Rules of Civil Procedure, but when he wants some information that isn't required by the Federal Rules of Civil Procedure, he says he wants it because he has to have it, because otherwise bad things will happen to him. I don't think that's quite fair.

MR. BERNICK: It's required by the Federal Rules of

Civil Procedure that when discovery responses are made, there has to be a reasonable inquiry. We've been through this a thousand times.

MR. LOCKWOOD: I repeat, if you look at the rules on interrogatories, Your Honor, you will not see any requirement they be signed by a counsel or attested to by a counsel. It just doesn't exist.

THE COURT: Actually, I don't see in part nine a place where the lawyer is -- oh, it says, "To be completed by the legal representative. I swear that the information is true and accurate."

MR. BERNICK: I would say I would modify that and delete the next sentence. I'd say, "True, accurate, and complete to the best of my knowledge." That's what it says, to the best of my knowledge. All of the information is true, accurate, and complete. That would delete the next sentence.

THE COURT: Okay. It seems to me that Part J in the instructions can simply be directed to the legal representative and say to the legal representation if you are the legal representative of the injured person, you must sign part nine, and strike all the rest of it.

MR. BERNICK: Fine.

MR. LOCKWOOD: I'm sorry. Excuse me, Your Honor. I'm -- oh, okay.

THE COURT: And then part nine should be amended as

you stated.

MR. BERNICK: Yes.

MR. LOCKWOOD: Moving to the questions themselves, Your Honor?

THE COURT: Yes.

MR. LOCKWOOD: And keeping in mind that in general we still believe that at a minimum Mr. Frankel's form of questionnaire is better than this, there is a requirement in Part 2A, Diagnosed Conditions, that the -- "You have to have a separate part two for each such diagnosis, test, consultation, treatment, or medical assessment. For your convenience additional copies of part two are attached as Appendix C." I mean that is essentially -- allows the debtor to get I guess -- I'm not sure what it is -- impeachment material or something like that. In other words, it's -- you've talked earlier about the claimants are putting in the stuff that they say supports their claim. But this is an effort to generate a multiplicity of things, so that the debtor can have their experts or whoever look among them and try and determine whether there's inconsistencies between prior or subsequent or whatever, and then --

THE COURT: Oh, I didn't see it that way, Mr. Lockwood. What I thought the debtor was asking was, for example, whether there is a disinterested -- I'll use that word -- doctor and maybe a quote/unquote interested doctor, and that

-- I thought that was the reason for the information. Maybe it duplicates too much.

MR. LOCKWOOD: Well, if you -- I'm focusing on the language that says, "Please complete a separate part two for each such diagnosis, test, consultation." The stuff about the relationships are separate questions under the -- under each form in part two.

THE COURT: Well, yes. So what it's saying, for example --

MR. LOCKWOOD: I mean for a cancer claimant, for example, every time you went to the doctor, it would produce potentially a diagnosis, test, consultation, treatment, and if you've been -- had cancer for five or ten years, I mean you might have to produce a ton of part twos, each one of which describes each visit to the doctor.

THE COURT: Yes, that's --

MR. LOCKWOOD: I just don't understand why this is -- why --

THE COURT: I think that's -- in that sense I agree with you. That's asking too much. It seems to me that there may be certain parts of these, for example, the cancers, once diagnosed, that's probably what you need, unless there's a contrary diagnosis at some point.

MR. BERNICK: Let me --

MR. LOCKWOOD: Well, even in the case of severe --

MR. BERNICK: Let me look at this. See, the problem -- obviously, you know where we're going, which is the -- we want to know about all the diagnoses of this asbestos -- alleged asbestos-related condition. That's what we want to know. Different doctors, different times, different conditions, that's what we want to know. We don't want all of the treatment, history, and all the rest of that stuff. So I think what we probably should do, "If you have been diagnosed with multiple and/or if you received diagnoses, consultations relating to the same condition by multiple doctors, please complete part two for each such --" I think I would probably be inclined to take out the word treatments in both situations, because I think that that's --

THE COURT: Well, in consultations and medical assessments maybe -- if you're really looking at diagnoses --

MR. BERNICK: You're really looking for diagnoses.

THE COURT: -- then why don't you limit it to diagnoses --

MR. BERNICK: Yes, I would say, "Consultation --

THE COURT: -- except perhaps for the pulmonary function test? I don't know whether you need -- or maybe you can define it --

MR. BERNICK: Or say, "And/or receive diagnoses, comma, diagnostic tests." So it's not all tests. It's diagnostic tests relating to the same condition for each such

diagnosis and diagnostic test. So we will eliminate, "consultations, treatments, and medical assessments," from both sentences. We will still include diagnosis, and we will include tests, but they will be only diagnostic tests.

THE COURT: Mr. Lockwood. Okay. Next.

MR. COHN: Excuse me, Your Honor. Once again, this is Daniel Cohn for the Libby plaintiffs.

THE COURT: Yes.

MR. COHN: I do want to clarify since every time a patient goes to the doctor in effect they are re-diagnosed. I take it that what is being referred to is the first diagnosis by a particular doctor.

THE COURT: Maybe it would make sense, Mr. Bernick, to say the initial diagnosis, and then any diagnosis that changes the original diagnosis.

MR. BERNICK: That's fine. We will include language to that effect.

THE COURT: Okay. Mr. Cohn, I think that would make more sense.

MR. COHN: It would certainly limit the amount of burden here, Your Honor.

THE COURT: All right. Okay.

MR. BERNICK: Mr. Lockwood is now flying through the balance of these questions, because they're so pure and clean. Right?

MR. LOCKWOOD: My objection to the extent of them has already been noted. In -- continuing on, there's a paragraph starting, "With respect to your relationship to the diagnosing doctor," when -- the second question is, "Did you pay the doctor for the services performed?" I'm not exactly -- for the diagnosis or for treatment? I mean I'm not quite sure. I mean I'm not sure what the services are here. My assumption is that what is being sought -- and again I -- just this seems to me to be an effort to show bias, which is an individual issue for between a plaintiff and his doctor, but it --

MR. BERNICK: I'll amend it to say, "diagnostic services."

MR. LOCKWOOD: I take it the word counsel in the next sentence should be s-e-l not c-i-l.

MR. BERNICK: We're working with an old version. Yes.

MR. LOCKWOOD: Oh, okay.

THE COURT: I'm not sure that the words, "were you required," are appropriate. Maybe it's did you retain counsel.

MR. BERNICK: Yes. Right. We wouldn't want to imply any -- did you retain counsel in order to receive --

THE COURT: I'm not clear about what you're trying to get out with respect to the did you pay for services of the diagnosing doctor. Are you trying to find out whether the lawyer paid, or no one paid, or --

MR. BERNICK: Well, the lawyer paid. Yes.

THE COURT: Okay. Maybe it should just say who paid. "If the doctor was paid for the diagnosis, who paid him?"

MR. BERNICK: Well, as much as possible, you're trying to get check in the box type of thing.

THE COURT: All right. Well, because here's the thing. If, in fact, there is a recovery for this plaintiff, won't the lawyer have been reimbursed for that payment by the plaintiff anyway?

MR. BERNICK: Okay, so --

MR. LOCKWOOD: I believe this is --

MR. BERNICK: That's fine. We'll do fill in the blank. "Who paid?"

THE COURT: Okay. Next.

MR. LOCKWOOD: The final question, "Did the doctor have a financial or social relationship direct or indirect with your legal counsel," as written would appear to be -- require the plaintiff, who's the one who is supposed to fill this out, to determine from either his doctor or his lawyer whether they belong to the same gym, among other things.

THE COURT: Yes, I agree. That's --

MR. LOCKWOOD: I mean this is just ridiculous.

THE COURT: I agree. I understand what you're trying to get to, but, frankly, I'm not sure that that's a proper statement.

MR. BERNICK: Well, what -- here's what -- what we are trying to get to is does the doctor have a financial or social relationship with the lawyer. That's what we want.

THE COURT: But the plaintiff may not know, so the question may be are you aware of a financial or social relationship with the -- between the doctor and your legal counsel, and if so, what is it.

MR. BERNICK: Fine.

MR. LOCKWOOD: Your Honor, I mean what is the point in asking whether or not a lawyer has -- you know, plays bridge with a doctor or something? I mean --

THE COURT: Actually, I --

MR. LOCKWOOD: -- the social relationship part of this, I -- it's one thing to talk about raising questions that somehow or another these doctors are on the lawyers payrolls in some way, but this social relationship --

MR. BERNICK: Very soft hypothetical. Extremely.

THE COURT: Well, I don't need a hypothetical. Why doesn't the question before it address it? "Was the diagnosing doctor referred to you by counsel?" Why isn't that enough?

MR. BERNICK: Because there are -- there's a vast web of relationships between the lawyers and the doctors, and this is an opportunity to get the claimant also to say what he knows or she knows.

MR. LOCKWOOD: And then the --

MR. BERNICK: Excuse me. So whether or not there was payment or retention, that's ultimately not going to answer the question. The question is, for example, if the Motley Rice firm has an ongoing financial relationship with a certain doctor who then sees a claimant who is represented by Perry Weitz.

THE COURT: Exactly, but how are the plaintiffs going to know that?

MR. BERNICK: Well, but see you don't -- we don't know but --

THE COURT: Well, fine, then ask are you aware of, you know, a relationship between your legal -- don't say financial or social, just a relationship between your doctor and counsel, and if so, what is it.

MR. BERNICK: Fine.

MR. LOCKWOOD: Again, Your Honor, I would just note that -- I mean what --

MR. BERNICK: This is a filibuster. He --

MR. LOCKWOOD: The answer to that is the doctor and my lawyer are friends.

THE COURT: Fine.

MR. LOCKWOOD: What expert is Mr. Bernick going to find who's going to say that has any bearing on an estimation issue as to the validity of this guy's claim? I mean this is so -- this is just outrageous. The extent to which he is going

afield here looking for -- this is sort of impeachment material or bias. If you were trying an individual case, it might conceivably have some relevance, but I mean --

THE COURT: Mr. Bernick, you're going to get the names of the doctors and the names of the lawyers, and, quite frankly, from your own experience, aren't you going to know who has relationships?

MR. BERNICK: Well, the amazing thing, Your Honor, is that Judge Jack kind of got into it. Other people have gotten into it in part, but there really is -- I hate -- it sounds like, you know, there's a crusade. There's no crusade. Nobody really knows all of these relationships, unless --

THE COURT: Well --

MR. BERNICK: -- unless you conduct discovery, and the fact of the matter is that this now is a very, very key issue. I'm prepared to take social --

THE COURT: Wait. Let me ask a question. Do the Trust distribution procedures require a diagnosis by or a read by any specific entities?

MR. BERNICK: No.

MR. LOCKWOOD: No.

THE COURT: No.

MR. BERNICK: No.

THE COURT: So you can still use the pre-petition entities for that purpose.

MR. BERNICK: Yes. See, I would take this, Your Honor, and I would say --

MR. LOCKWOOD: Yes --

MR. BERNICK: Excuse me. Your Honor, we are never going to -- we really -- I think what's going on now --

THE COURT: It's your time.

MR. BERNICK: -- is that we're running against the clock, and we can see exactly what's happening. The clock is going to run out before 5:00.

THE COURT: Well, then you're going to stay, folks.

MR. LOCKWOOD: Your Honor, I mean this is just gross. Mr. Bernick and I have spent days arguing about this kind of stuff. He's told me to pound sand every time. Now I have an opportunity to argue to a neutral observer, and he claims that I'm trying to run out the clock for reasons -- why would I want to run out the clock?

THE COURT: Would you both like to stop attacking each other and get to the merits, or do you really want to come back after 5:00? I mean it's your colleagues who are going to suffer not me.

MR. LOCKWOOD: In any -- I think --

MR. BERNICK: I would offer to amend this --

MR. LOCKWOOD: -- this question is grossly inappropriate.

MR. BERNICK: -- to say, "Did the doctor have a

financial or professional relationship with your legal counsel?" Now, I would also be -- I think I want to ask the claimant this. If I can get the -- if we can get the lawyers to attest to that, that's also fine.

THE COURT: It's not a questionnaire for the lawyers. I mean they're --

MR. BERNICK: Well, I've only got a couple opportunities to find out this very important issue of bias. There's a network out there. I want to know what the network is.

THE COURT: I think it's fine if you say, "Are you aware of a relationship between your counsel and your doctor, and if so, what is it?"

MR. BERNICK: That's fine.

THE COURT: And if what you get is that they're friends, then --

MR. BERNICK: It's -- done deal.

THE COURT: -- it's an irrelevancy.

MR. BERNICK: Done. Done.

THE COURT: All right. Next.

MR. LOCKWOOD: I don't know why they need all the specificity about tobacco products, Your Honor. I mean it's one thing to say do you use them or have you ever used them. It's another thing to start trying to get your tobacco history. I mean --

THE COURT: Yes, I'm not really clear about that either.

MR. BERNICK: Because it translates directly into risk. On the basis of numbers of pack years you can get directly to risk of lung cancer. It's a question of arithmetic calculation based upon published tables. If you don't have pack years, you don't get risk. If we're talking about somebody who's a 35-pack year smoker and is exposed to Grace asbestos for a period of three months, and the question is did Grace asbestos substantially contribute to their lung cancer, we can calculate in half a heartbeat probability of causation on the basis of the number of cigarettes they smoked. It's that simple.

MR. LOCKWOOD: And we will then knock out one of 118,000 claims we think on the basis of this Court making an estimation not a --

THE CLERK: Speak into the mike, please.

MR. LOCKWOOD: -- an estimation not an adjudication of that issue. Right?

MR. BERNICK: No, to the contrary the evidence is overwhelming. The people who had significant exposure to asbestos also were heavy smokers. Everybody knows that.

MR. LOCKWOOD: And the evidence is also overwhelming of the synergy between asbestos and smoking, and you have a 55 times greater risk of getting lung cancer if you had asbestos

exposure as well as --

THE COURT: All right.

MR. LOCKWOOD: -- as well as --

THE COURT: I don't -- it's calculated to lead to relevant admissible evidence, so it's fine. I don't know how it will be used, but it's calculated that way. It's fine. Next.

MR. LOCKWOOD: On the B reader form, the same question about financial or social relationship with counsel or --

THE COURT: Fine. It should be -- all of them will be amended the same way.

MR. FINCH: Your Honor, what if a chest x-ray was read by a doctor that was not a B reader, or what if the asbestosis was diagnosed through a high resolution CAT scan?

MR. BERNICK: Well, then that's pretty simple, because then you'll be able to provide the documentation. Along with the required documentation it says give us what you got.

THE COURT: Do you want something else added under four that says if it wasn't provided by a B reader, who did it, and what was the method?

MR. FINCH: Sure.

MR. BERNICK: Okay. We'll stick that in.

THE COURT: Fine.

MR. LOCKWOOD: On the pulmonary function test, why do we need the height and weight?

MR. BERNICK: Because that --

THE COURT: That definitely affects -- even I with a child with -- not asbestos -- with asthma know that's a very relevant standard to the readings.

MR. LOCKWOOD: Well, but I mean it's a very individualized standard as well.

THE COURT: Yes. Well, okay. I don't know whether there will be evidence about the population and whether or not they will be the same height and weight.

MR. BERNICK: It all goes into the interpretation of the --

THE COURT: But it does go to that, so, all right. That's approved. I don't know what the experts will do with it, but it's calculated to lead to appropriate evidence, so let's go.

MR. LOCKWOOD: Same function -- question about financial and socialization.

MR. BERNICK: We will conform -- just to save time, we will conform all questions relating to the relationship to comply with what we have undertaken and the Court has ordered as that -- those questions first were posed to the questioner.

THE COURT: All right.

MR. LOCKWOOD: Okay, then move to Part 3, "Exposure

to Asbestos Products."

THE COURT: All right.

MR. LOCKWOOD: The first one -- the very first text under that talks about completing a separate Part 3 for each applicable site. If you look at Part 3, it is three pages, and so as we were discussing earlier this morning, Your Honor, if you're a construction worker that's worked at 50 or 100 sites in their life -- and this says asbestos-containing products. It doesn't say Grace asbestos-containing products. So you get to do multiple forms for not only all your Grace exposures but all of your non-Grace exposures. I mean this is --

THE COURT: Yes, I think the ruling that I made with respect to the litigation should -- and the claim having been filed should be sufficient for that purpose. If somebody has filed a claim, you're going to know it, so why do you need that additional information now?

MR. BERNICK: I don't -- what we said was that if they have filed a claim, they should know the information, and they then should provide it. If they have not filed a claim, then we're saying that -- you've just already told us you've ruled that we can't get -- we're not going to get the information.

THE COURT: Right.

MR. BERNICK: So where they filed a claim we want all of this information --

MR. LOCKWOOD: Well, if they --

MR. BERNICK: -- for each of the sites.

MR. LOCKWOOD: If they filed a claim, they get to fill out 50 or 100 three-page forms --

THE COURT: Possibly. If they've sued --

MR. LOCKWOOD: -- in part of this non-burdensome questionnaire.

MR. BERNICK: If they've sued all those people.

THE COURT: If they've sued 50 people, yes, that's right.

MR. LOCKWOOD: No. No. No. It has nothing to do with the number of people they've sued. It has number of exposures.

MR. BERNICK: No, we --

MR. LOCKWOOD: Let's assume they've sued Grace --

MR. BERNICK: Peter, listen. Listen.

MR. LOCKWOOD: -- and Johns Manville, Your Honor.

MR. BERNICK: No, Peter, listen. At least listen. The Court has said if we have got a -- if there's a claim or a lawsuit, so that's the world. We're not -- we are agreeing -- we're complying with what the Court has said. This will not extend to other exposures where a claim or a lawsuit has not been made.

THE COURT: All right, so the definition --

MR. LOCKWOOD: I understand that, but, Your Honor --

THE COURT: -- the introduction section has to be changed.

MR. LOCKWOOD: But my -- the point I'm trying to make, Your Honor, if I can make it without interruption, let's assume you've sued two, Grace and Johns Manville.

THE COURT: Yes.

MR. LOCKWOOD: Actually, let's say it's not Johns Manville, because they're -- Owens-Illinois let's say, and in the course of your working career you worked on 100 job sites in which you were exposed to the products of Grace, Owens-Illinois, and a bunch of other asbestos manufacturers. Even if you limit this requirement to people who file claims, it still says you've got to fill out a separate form for each job site that you worked at even though you've only sued two defendants, and even though the job sites may not even relate to exposures from either of those two defendants.

THE COURT: All right. What about this? In lieu of filling it out -- filling out a questionnaire for non-Grace exposure, for anybody who has filed a claim or instituted a lawsuit, they can attach a copy of the lawsuit --

MR. BERNICK: No.

THE COURT: -- as opposed to filling this out. Mr. Bernick, this is could be very cumbersome.

MR. BERNICK: Your Honor, he's --

THE COURT: It's too much. I'm not going to approve

it.

MR. BERNICK: He is negotiating.

THE COURT: Mr. Bernick, I'm not going to approve it. It's too much, so figure out how to make it less.

MR. BERNICK: Well, if Your Honor doesn't approve -- that's fine. This is exactly the problems as why --

THE COURT: This is why you're here, to negotiate this order.

MR. BERNICK: I understand. Well --

THE COURT: It's either negotiate or get my rulings.

MR. BERNICK: Right, but see this is the problem, is that if it's only in the lawsuit -- what the lawsuits say, Your Honor, they say John Doe was exposed to Grace products. John Doe -- in fact, they don't even say that. John Doe was a worker, and they say he was exposed to the defendant's products, and there's --

THE COURT: All right.

MR. BERNICK: There's an Exhibit A.

THE COURT: Okay.

MR. BERNICK: There's 40 different defendants.

THE COURT: That's fine. If that's the case and it's not relevant, then have one separate page for every non-Grace entity that you have either sued or filed a claim against, and on that one page list the exposures and the occupation code without all of this other identification, because that way you

can get the fact that there was a suit filed against another manufacturer or whatever -- distributor or whatever it's going to be in the occupation code and the dates.

MR. BERNICK: Well, Your Honor, with due respect, and I know it's late, but this is absolutely of the essence. Let's assume you've got an individual who was exposed to asbestos for ten years, and they're exposed to Grace asbestos in the last year, we get very detailed information on the exposure, and it turns out it's a job where his exposure was minimal.

THE COURT: How is that going to translate to future claims, which is the purpose?

MR. BERNICK: Because the -- and he has got any kind of particularly asbestos. In the prior nine years he was working directly with and manipulating Owens-Corning asbestos, Owens-Illinois asbestos. You have to know the nature of the exposure, otherwise, they -- all exposures will be treated the same, and there's no sense of whether the Grace exposure actually was causal. They want to be able to argue at the end of the day that no matter what the Grace exposure was, it was enough and not have the Court know about how intense the other exposures are.

THE COURT: I still think this is too much for everybody for every exposure.

MR. BERNICK: But every site --

THE COURT: Now, if somebody has ten --

MR. BERNICK: It's every site. All your --

THE COURT: If somebody has ten exposures over the course of a lifetime, that's one thing. But if you're a construction worker and working on ten sites a year for 25 years, it's too much.

MR. BERNICK: But, Your Honor, those -- they have brought claims against all of those different people. If they brought claims, it's not too much trouble for them to specify what's on a piece of paper.

THE COURT: That's what I said. Put it on one piece of paper what the occupation code --

MR. BERNICK: We'll put it on one piece of paper per site.

THE COURT: -- is, what the site was, whatever information you want without all of this.

MR. BERNICK: Got it.

THE COURT: During each exposure what, if any, of the following were you, a worker who removed, a worker who mixed --

MR. BERNICK: Yes, one page per site.

THE COURT: No, one page per claim or per suit per defendant. One page.

MR. BERNICK: One page per claim?

THE COURT: If you file -- if I'm the asbestos plaintiff --

MR. BERNICK: Right.

THE COURT: -- and I have sued Grace and Owens-Corning and Pittsburgh Corning --

MR. BERNICK: Right. I get three -- there are three pages.

THE COURT: There are -- well, you can have exposure to Grace at every place they ever worked. This is fine for Grace.

MR. BERNICK: Okay.

THE COURT: I'm not objecting to it for Grace. I'm objecting to it for not Grace.

MR. BERNICK: Okay, so it's for each non-Grace claim defendant or sued defendant we get one page on exposure.

THE COURT: One page on exposure that tells the person to list the place where they were exposed, the dates where they were exposed, the product, whatever you want on one page.

MR. BERNICK: Fine.

THE COURT: Just a minute.

(Pause)

THE COURT: I'm sorry. Next.

MR. BERNICK: I think that that would take us up to part four, the employment history.

MR. LOCKWOOD: Well, wait a minute. Excuse me, Your Honor. So if they were exposed to Grace products in, you know, X number of job sites, they have to fill out a three-page copy

of this form for each one of those X job sites? Again, I mean this is intensely individual fact oriented. I mean I just cannot understand how we --

THE COURT: They have to fill out a one and a half page --

MR. LOCKWOOD: We're going to have experts that are going to --

THE COURT: The part that related to Grace starts on my page four and ends on my -- at the top of my page five. It's 14 questions, and, yes, they have to fill that out for every Grace exposure that they're claiming against the debtor. That's --

MR. LOCKWOOD: So it's two pages.

THE COURT: Well, I have it as one and a half.

MR. LOCKWOOD: Well, okay.

THE COURT: The other says exposure to other asbestos-containing products, and it's non-Grace asbestos-containing products. So it's 14 questions, and, yes, that's appropriate for the debtor to figure out whether this was a major or not major or any cause of the liability.

MR. LOCKWOOD: Well, just for the record, Your Honor, the law on what is a contributing factor sufficient to give liability varies from state to state among the 50 states, and in most states it's minimal.

THE COURT: I understand, Mr. Lockwood, but I also

know that some of these plants have been closed for several years, and if the people were exposed at a place that's been closed for 25 years, the likelihood that 25 years from now I'm going to have the same claims based on the same exposure to that product and that work site is probably going to be less. So it's relevant to proving whether or not there will or will not be a likelihood that the types of claims that have been filed against Grace in the past will be likely to be filed against Grace in the future based on job site and type of employment and work exposure.

MR. LOCKWOOD: I don't think that's the use that Grace proposes to put this to, Your Honor.

THE COURT: Well, all right. In any event --

MR. LOCKWOOD: But I guess we'll find out.

THE COURT: Okay. Next.

MR. COHN: Your Honor, this is Daniel Cohn again --

THE COURT: Yes.

MR. COHN: -- for the Libby claimants. One small matter which is in question number six under -- down at the bottom of the page.

THE COURT: All right.

MR. COHN: There's a request for social security number, and I think just because of the security implications of that, that should be stricken.

MR. BERNICK: What?

THE COURT: The social security number I believe -- well, this is not going to be filed on the record. This is just going to Grace, Mr. Cohn.

MR. COHN: Well, so long as -- I mean if you want to instruct them to keep -- themselves to keep it confidential, then I suppose that might work. But it's probably just safer to not have it be out there in the stream of commerce to begin with.

MR. BERNICK: Well, it's not going to be in the stream of commerce. Your Honor, there's all kinds of confidential information that gets handled in the course of litigation, and this is no different.

THE COURT: Why don't we build into the case management order or this order that it will be kept confidential. It's for use in this litigation period, and then it's not to be disclosed to parties outside the litigation without order of Court. It's not going to be filed anyway, so I think a confidentiality agreement will resolve that. Can you live with the last four digits of the social security number?

MR. BERNICK: No.

THE COURT: Why not?

MR. BERNICK: Because there's a -- it's a question of being able to verify the person's identity. I mean there's no --

THE COURT: That's what we do in bankruptcy, identify

people by the last four digits.

MR. BERNICK: We match these claims with silica claims. We match these claims with other claims that are made against other entities, so we can verify --

THE COURT: Yes, but how many John Smiths have the last four digits 0-5-5-5?

MR. BERNICK: A lot.

THE COURT: You know, if there is somebody who has a duplicate name and a duplicate number, then you can ask for more.

MR. BERNICK: We'll inquire to find out. There's no interest that we have beyond the ability to get other information, and we'll find out if we can live with that.

THE COURT: All right.

MR. BERNICK: If we can, we can. If we can't, we can't. We'll let you know.

THE COURT: Well, because even the 2019 statements are limited to four digits, so I don't see why that should be a problem.

MR. BERNICK: There's a question of matching these other databases, Your Honor, and I just don't know.

THE COURT: All right.

MR. COHN: And, Your Honor, one more brief request, if I may. Might local counsel be excused from the call?

THE COURT: Yes.

MR. COHN: Thank you, Your Honor. I appreciate it.

MR. LOCKWOOD: One point I would note, Your Honor, just for the record. Four C on this thing implies an ability to produce information which I think is fanciful. It says, "Dates and frequency, hours slash day, day slash year, of each exposure to products attributed to Grace." I mean plaintiffs are going to be doing this from memory for things that happened 20/30 years ago, and Grace is going to --

THE COURT: That's probably right, and they can say I don't know.

MR. LOCKWOOD: -- try to have its experts take the position essentially that if the plaintiff doesn't remember how much his exposure was, that they haven't satisfied their burden of proof --

THE COURT: Mr. Lockwood, that will be my call --

MR. LOCKWOOD: -- to prove their dosage.

THE COURT: -- and if it's something that happened 25 years ago and they say I don't remember, I'm going to believe that they don't remember. So I will caution Grace in advance not to try that type of attack if Grace had any intention of doing that. Next.

MR. LOCKWOOD: Paragraph -- number -- questions number, on the same topic, nine in particular, I don't understand why they need the dates that the other injured person was exposed to each Grace asbestos-containing product.

The claim is not being pursued here on behalf of the other injured person. It's being pursued on behalf of the person who has a contact with that. The issue is whether the person with the contact had sufficient proximity, and most of these cases involve mesothelioma claims. I'm not sure I've heard of any sort of derivative asbestosis or pleural claims.

MR. BERNICK: Then they don't have it. Your Honor, this -- frankly, this is -- I will personally run out of time, because I have got to catch a plane, and all we're doing is repeating things, and this is a frivolous point. Obviously, if they don't have a derivative claim for some other disease, they don't have it, and it's completely irrelevant. With respect to mesothelioma, if the claim is for derivative exposure, everything depends upon the person who was principally exposed, but it --

MR. LOCKWOOD: But it --

MR. BERNICK: Excuse me.

MR. LOCKWOOD: But there's no minimum dose requirement for mesothelioma, Your Honor, so --

MR. BERNICK: Excuse me. This is absolutely standard information. Did your husband bring asbestos fibers home on his clothes, and did you wash them? That's really what we're talking about. That's the classic exposure situation. If you don't know what the injured person's exposure was, you have no way of gauging whether there's any basis for the derivative

claim to say that there was exposure.

THE COURT: Yes, but I don't know how somebody could say the date that each person was exposed to -- you know, every time your husband comes home and you wash clothes, is that supposed to be listed separately as a date of exposure?

MR. BERNICK: It's very simple. My husband worked at X plant from 1965 to 1966. He came home with asbestos on his clothes, and I washed them.

MR. LOCKWOOD: Right, and so then let's assume the husband is dead. The wife comes down with mesothelioma, and now she's got to fill out a form saying my husband was exposed to Grace products on the following days for each asbestos product.

MR. BERNICK: She's got mesothelioma --

MR. LOCKWOOD: How is she possibly going to be able to do that?

MR. BERNICK: Let me venture to say if she has mesothelioma, all of your law firm clients I'm sure have already investigated every possible exposure and every possible claim that could ever be brought on behalf of that woman, because there's a very valuable place --

THE COURT: I think the problem is the underlying each. If it simply says the nature of the other person's exposure to Grace's products, that's one thing. And then if it says approximate dates other person was exposed to Grace as per

asbestos products, that's probably fine. But asking for each date as to each product, nobody's going to be able to remember that.

MR. BERNICK: If they can't remember it, John, they can't remember.

THE COURT: Mr. Bernick, you're asking for something that's not possible. Amend it. Okay. Next.

MR. LOCKWOOD: Where do we stand -- I take it on sub-paragraph B as exposure to other asbestos-containing products, we've been through that. That's the one page --

THE COURT: That's right.

MR. LOCKWOOD: -- against the other defendant?

THE COURT: Correct.

MR. LOCKWOOD: Okay. Part four, "Employment History." "Other than jobs listed --" at the beginning of it it says, "Other than jobs listed in part three, these being the jobs that you claim your exposure is based on, please complete a separate part four for all of your prior work experience during the past 20 years up to and including your date of your current employment."

THE COURT: I don't have -- that's not what mine says. It says, "Other than jobs listed in part three, please complete a part four for all of your prior work experience up to and including your current employment."

MR. LOCKWOOD: Did they --

THE COURT: For each job --

MR. LOCKWOOD: Mine says separate, but even if they deleted the word separate, if it says, "Please complete a part four," aren't they saying that you have to complete a separate one?

MR. BERNICK: "Other than jobs listed, please complete this part four for all of your prior work experience including," blah, blah, blah, blah. We just want to know where else they worked.

THE COURT: Okay. I --

MR. LOCKWOOD: What's the relevance if it's not a place where they claim exposure to asbestos, Your Honor?

THE COURT: Yes, I agree.

MR. BERNICK: For obvious reasons. If somebody was working in a textile mill, and they don't claim exposure to asbestos products, there are a lot of different ways in which textile fibers can cause exactly the same conditions. This is well established. Judge Jack's opinion specifically dealt with saying B reads pick up all kinds of exposures to all kinds of other materials. All we're asking them for is their jobs.

MR. LOCKWOOD: Your Honor, Judge Jack dealt with the other diseases that would present on an x-ray the same as silicosis. She didn't address at all what other diseases would present on an x-ray or diagnostic similar to asbestos.

MR. BERNICK: That's false.

THE COURT: All right. Well, the question is --

MR. LOCKWOOD: It is not false.

THE COURT: This says for every job you ever had. Some of these folks are probably 75. I mean do you really need to go back to the time that they were ten?

MR. BERNICK: Your Honor, it is a minimally invasive question that produces important information. This again is a question of if it's all burden, if they can't remember it, they can't remember it. What do you want me to say, industrial jobs that you've held?

THE COURT: All right. It's -- yes, that might -- that might be satisfactory.

MR. BERNICK: Okay. Industrial jobs that you've held. That's fine.

THE COURT: All right.

(Pause)

THE COURT: Okay. With respect -- I have -- this is one that I noted on my own, Mr. Bernick. With respect to part five, Litigation, A, question seven, "Were you deposed, and if so, attach a copy of the deposition." They may not have a copy. The lawyer may or may not have a copy. I don't know, and I'm not going to require them to get one. So if you want permission to find out where it is and get one and pay for it, fine, but I don't -- I really don't know that I see the need for deposition transcripts. If Grace was party to the suit,

Grace can get it.

MR. BERNICK: Well, but that's -- the point is we're really talking about people where Grace was not a party to the suit.

THE COURT: Well --

MR. BERNICK: So A we will --

THE COURT: It says, "Was Grace a defendant in the lawsuit?"

MR. BERNICK: Yes, well, that's yes or no.

THE COURT: Okay.

MR. BERNICK: "Have you ever been a plaintiff?"

THE COURT: So if it says, "Were you deposed? If Grace was not a party, attach a copy," what do you need a copy for? And it'll have to be at Grace's expense.

MR. BERNICK: That's fine. Grace's expense. But we need a copy, because it's precisely in depositions against other defendants --

THE COURT: All right.

MR. BERNICK: -- that they're going to make out the position that they had other exposures.

THE COURT: Okay. That's fine.

MR. LOCKWOOD: Your Honor, question six requests information that is not generally available in discovery and the State Court system --

MR. BERNICK: Or the federal system.

MR. LOCKWOOD: -- and it is -- or the federal system and is -- I don't understand the relevance of it, but whatever --

THE COURT: Well, actually --

MR. LOCKWOOD: -- Owens-Illinois may or may not have paid somebody to settle a claim --

THE COURT: The recent cases actually are saying that it is discoverable even if it's not admissible under the Federal Rules of Evidence.

MR. LOCKWOOD: That may be. I'm not arguing necessarily the whole thing on -- a lot of -- the question is what's the relevance. I mean if you got paid money from Owens-Illinois on a claim against Owens-Illinois, and you've disclosed that you filed a lawsuit against Owens-Illinois, and you --

THE COURT: Well, it could be a significant issue.

MR. LOCKWOOD: -- said that a settlement agreement was reached against it, what -- are we going to be having contribution and indemnification cross claims in this --

THE COURT: No, but it could --

THE CLERK: Use the mike.

THE COURT: It could be an issue, Mr. Lockwood, with respect to whether or not -- if it was a huge settlement, then that seems to indicate that maybe the claim against Grace, which has been filed after this case was filed not before, for

example, or something that was filed right before the bankruptcy was filed, has less significance in terms of Grace's product. It may. I'm not prejudging that it does, but it may.

MR. LOCKWOOD: Well, yes, I mean that's just speculation. I mean --

THE COURT: Of course.

MR. LOCKWOOD: -- what kind of an expert are you going to have in here that come in and say, well, somebody got two million dollars from Owens-Illinois in a settlement, and that, therefore, means that Grace's liability is X? I mean what --

THE COURT: I don't know, but it may be enough for other appropriate inquiry. The terms of the settlement, however, I'm not sure I understand why you need the terms.

MR. BERNICK: Very simple. First of all, they're the one's who are asking for all settlement information as being an indicator of where the marketplace stands with respect to claims. These are all people who have received settlement for their claims in the last four or five years.

THE COURT: But not from Grace.

MR. BERNICK: Not from Grace, but the settle -- if they got settlement -- the terms of the settlement paid them for one disease, and that is it was settled for a certain disease, and they're looking for another disease from Grace, or they alleged the same exposure and take, you know, no money for

it from another company.

THE COURT: But you keep going back to something that's like a disallowance of this claim, and it's not being used --

MR. BERNICK: No, it's a question of pricing the claim. What's been the marketplace price for these claims --

THE COURT: And you're going to have an expert that will tell me that, because a particular person settled a particular claim --

MR. BERNICK: No. No. It'll be --

THE COURT: -- for a specific amount, that that's going to have predictive value in the future.

MR. BERNICK: No, it's they are the ones who are going to take the position that settlements -- settlement dollars are predictive future trends. All that we --

THE COURT: Grace -- I thought it was Grace's settlement dollars.

MR. BERNICK: No. No. No, it -- that's the point is that they'll say Grace's prior settlement are, but then they'll fill in the gap between the time of bankruptcy and the time of the estimate with their own statements about what has happened to market prices since. And all I'm saying is let's find out what happened to the market prices --

THE COURT: All right.

MR. BERNICK: -- for these particular claims.

THE COURT: Is that what your theory is going to be?

MR. LOCKWOOD: I have absolutely no idea what our theory is going to be, and, moreover, I have absolutely -- to the extent that you're looking for -- Mark Peterson would be looking to somehow or another extrapolate increases in Grace's settlement values, which typically I don't think he does do -- if Grace has a settlement history of its own, that's what he looks at. He doesn't need to use data from other claims, and in any event, even if that were true and you got -- and you're determined to let him have the settlement amount --

MR. BERNICK: The settlement amount -- we would agree to this, (a) we want the settlement, because we need to know what the settlement was for, (b) we would agree not to consider or not even to ask for information relating to the price of the settlement if you all will agree that you're not going to characterize what happened to market prices for other claimants or other defendants similarly situated to Grace from 1990 -- from 2001 going forward to the present time. But if you are going to place that at issue, we certainly want discovery of what's happened with respect to these people.

MR. FINCH: Your Honor, the way he's -- I mean I've tried more of these estimation cases probably than anybody in the country, and the way they typically are done is you estimate based on the several share of the liability of the company, and you're not valuing the whole case. The claimant

from a mesothelioma case might get five million dollars all in from all the defendants. Grace's average settlement for mesothelioma might be $150,000. I mean I haven't looked at the data closely recently, but that's -- and so what Dr. Peterson and others like him, including Tom Florence, who was an expert hired by Grace at the time of the Sealed Air litigation to project what its liabilities were then, they look at the past several share of the liability. Grace has been paying $150,000 per case to resolve its mesothelioma cases, and the costs per case has been rising steadily across the decade of the '90s. In the early '90s they were paying $20,000 a case.

MR. BERNICK: Your Honor, I don't --

MR. FINCH: By 2001 they're paying -- let me finish, Mr. Bernick. By 2001 they were pay $150,000. And so he might extrapolate those trends forward, but he doesn't go out and say I'm trying to price what the aggregate settlement amount for a mesothelioma case across all defendants would be. No one has the data to do that.

MR. BERNICK: That's not the purpose of the proffer. It's completely beside the point. You may think that we're trying to find out how much a meso claim got as a whole. That's not the purpose of this exercise. The purpose of the exercise is to anticipate that Mark Peterson will not do what you're saying, that he is going to count the period of time from 2001 to the present, and we want to have the data that

bears upon it. And for us to sit there and listen, well, this is what Dr. Peterson's going to do or not, I don't know what he's going to do. But if he's going to get into this period of time, we want the data.

THE COURT: Well, okay. First of all, then let's limit the question to the time frame rather than any settlement, because these settlements can go back I don't know how many years. If you're really concerned with 2002 to the present or two thousand, whatever the year is, limit it to that time.

MR. BERNICK: That's fine.

THE COURT: That's number one. Number two, I still have some concern about the terms of the settlement.

MR. LOCKWOOD: Could we just limit it -- if I understood Mr. Bernick, what he really wanted to know was how the aggregate settlement amount was spread among the individual defendants as opposed to what non-monetary terms might have been like the scope of a release or -- I mean the terms of the settlement, to know them you'd have to have the entire settlement agreement and give him a copy of it.

MR. BERNICK: It's not -- that's not true. I said it, and I'll say it again. Your Honor, I apologize. I'm going to have -- I have to leave in about three minutes, and Ms. Harding can take over, but, frankly, this has been a process that's been far prolonged by repetitive arguments, and I think

we're kind of towards the end here. The purpose is exactly as I said. We want to know for what claim -- that is what disease -- if so and so claimant got a settlement, did he say he was getting settlement for asbestos, for pleural disease? He may have made a claim for severe asbestosis, but then --

THE COURT: Well, then ask that.

MR. BERNICK: Well, that's what we're going to get from the settlement -- from the settlement documents.

THE COURT: But I'm not sure you're entitled to the entire settlement document.

MR. BERNICK: Well, I don't know how else --

THE COURT: It seems to me that you can get -- you can say, you know, identify the defendants with whom you settled, the amounts, and for what disease.

MR. BERNICK: Fine.

MR. FINCH: Your Honor, that's -- almost all of these settlement agreements with defendants are going to have confidentiality provisions. The defendant Owens-Illinois is going to have in every release and every settlement is going to have this is confidential, and you can't disclose it unless and until --

THE COURT: I'm ordering it. Next.

MR. FINCH: Owens-Illinois isn't before Your Honor.

THE COURT: Then they can come in and contest it if somebody violates their agreements. I don't know what the

scopes of these agreements are. To the extent that the debtor is making a claim here that may be duplicative claim that it alleged against somebody else and for which it recovered, the debtor's entitled to know that.

MR. LOCKWOOD: Well, Your Honor, if the concern is about different diseases, there's an entire subsection (b) of this thing which is aimed specifically at determining whether or not you got a different --

MR. BERNICK: That's not in the settlement papers. It happens every day of the week that a claim is settled for a lesser disease, because they know they can't make out the claim for the more severe disease. We just want to know --

THE COURT: I don't have any problem with --

MR. LOCKWOOD: Claims get settled for a variety of reasons. I mean --

THE COURT: You can identify the defendant, get the amount, and the disease. It seems to me that's appropriate. If somebody who's not here has an objection to it and the document says that the debtor has to give notice, the debtor will give notice. Then if the debtor can't answer or somebody has an objection, I'll deal with it. Next.

MR. LOCKWOOD: Part seven, supporting documentation requires the person answering this questionnaire to give a medical release to Grace and attach it. That's not -- I mean if this was an individual litigation of an individual claim,

they might be able to get a court to order a plaintiff to give up their privacy rights to that extent. But essentially --

THE COURT: Yes, you're getting all the information in the claim form as it is.

MR. BERNICK: Well, if they -- but the point is this. They can't have it both ways. That is they can't be providing this information that is filling out the claim for but then saying I'm not going to authorize the release of any records in order to -- that might be -- that might bear upon the veracity of what I'm saying.

THE COURT: You've already told them they have to attach them.

MR. BERNICK: Yes, that's what I'm -- well, then if they have to attach them or have their lawyers provide them, we just want to make sure that -- well, fine. We don't need it.

THE COURT: All right. It's out. Next.

MR. LOCKWOOD: Have we discussed the part eight, plaintiff thing that he says he's swearing I haven't omitted any material information?

THE COURT: It's going to be changed to put in accord with the instructions.

MR. BERNICK: Yes, to be true and accurate.

MR. LOCKWOOD: Okay. Part nine --

THE COURT: We discussed.

MR. LOCKWOOD: And we -- that's directed to the

lawyers. Has that been eliminated?

MR. BERNICK: No, it's just been -- I modified 9(b).

THE COURT: Well, I don't think (a) is an appropriate question. This is not -- (a) is -- this form is not to be filled out by the legal representative as a legal rep. It's to be filled out as the legal rep for the agent of the claimant. So when you're asking about the social and financial relationships between the lawyers and the doctors, I don't think that's appropriate here.

MR. BERNICK: Well, you can't -- I mean we have to have it one way or the other. If the claimant is not being asked of this or doesn't know --

THE COURT: You are asking.

MR. BERNICK: But the claimant in all likelihood is not going to know, and this information bears one thousand percent on the very issue that we've been discussing here, which are who are these doctors. If we can't --

THE COURT: The fact that the claimant isn't going to know is what I tried to argue to you earlier, is the reason why it didn't belong there.

MR. BERNICK: Then I would be happy to have that out and have this in. This is the only way we're going to find out.

MR. LOCKWOOD: Your Honor, there's no provision in the Federal Rules for allowing discovery demands on a lawyer

for a plaintiff.

MR. BERNICK: That's absolutely --

MR. LOCKWOOD: You get discovery against plaintiffs.

MR. BERNICK: That's absolutely false.

THE COURT: That's not so. I think you can get discovery --

MR. LOCKWOOD: Well, you could take his deposition, but there's interrogatories and document production requests, which is what this is, are directed at parties.

MR. BERNICK: We'll take the depositions of all of the plaintiffs' firms to find out their relationship with the doctors. I'm happy to do that.

MR. LOCKWOOD: You can try.

MR. BERNICK: Well, we're going to -- if the Court will say that we are entitled to pursue this by way of other discovery, we will not include it in the questionnaire, and we'll simply proceed against the law firms and take the depositions.

THE COURT: I'm not making rulings about what's appropriate or what's not in terms of other discovery. What I don't think is appropriate is this question in this form. So I think (a) should be deleted. You can -- I've already ruled with respect to the claimants. I don't think you're going to get any valuable information there, but you want it in. You can have it in. Take (a) out and modify (b) as we talked about

earlier.

MR. BERNICK: What would you suggest, Your Honor, because this -- at this point if we don't get this information, you have eliminated our ability to deal with the whole problem of fraud and the submission of these claims in this case. We have got to have the ability to conduct the discovery. We thought this is the least painful way in which to do it. Absolutely the least painful way in which to do it. We're happy to take the depositions, but we can't sit there and accept a pig in a poke. That is get all this data and not have any idea about what the relationships are with --

MR. LOCKWOOD: Your Honor, if they're --

THE COURT: Well, there's a giant leap --

MR. LOCKWOOD: -- interested in determining fraud in the submission of claims, I would note the following. Number one, no plaintiffs have submitted any claims yet in this bankruptcy case, because there's no bar date. There's some pre-petition lawsuits pending, but this bankruptcy proceeding and estimation is not an effort to determine whether pre-petition lawsuits were or were not fraudulent. Secondly, it's -- again it gets to the individual claims, and it's an effort to -- it assume that if the claimants and the future claimants in particular and their lawyers who are on notice from Judge Jack that you couldn't use these B readers and you couldn't engage in these practices, that they continue to do so.

THE COURT: It's a giant leap to say that because a doctor and a lawyer play bridge together that there's fraud.

MR. BERNICK: I said I'll change that -- financial or professional relationship.

MR. LOCKWOOD: And what is a professional relationship, Your Honor?

MR. BERNICK: Well, it's very simple. They do business with one another.

THE COURT: Well, they obviously do business --

MR. LOCKWOOD: But they don't pay money, so it's not a financial relationship?

THE COURT: -- with one another. If there's an expert witness who's testifying, they obviously have a professional relationship.

MR. BERNICK: No. No. This is with respect to the doctors that are doing the diagnoses that are in the form.

THE COURT: Right.

MR. LOCKWOOD: Your Honor, I respectfully submit that the time to argue what discovery they can get against lawyers is when they make a motion for that purpose. This questionnaire should be directed at claimants.

THE COURT: (a) is too broad. I agree. (a) is too broad. It has to be deleted, and modify (b) as we talked before.

MR. BERNICK: Your Honor, now we're at the 11th hour

in this last question, Your Honor.

THE COURT: Mr. Bernick, you asked me for rulings. I'm giving you rulings.

MR. BERNICK: I suggested that we actually defer this, and I suggest that we defer that, because we're now talking about whether we're going to -- they will fight us tooth and nail to avoid learning --

THE COURT: They may.

MR. BERNICK: -- those facts, and we need --

THE COURT: Well, they may.

MR. BERNICK: And we need to learn those facts. It's just that simple.

THE COURT: Well, you may, but it's --

MR. LOCKWOOD: Your Honor, Mr. --

THE COURT: -- not appropriate in this questionnaire which is directed to the claimant.

MR. BERNICK: Okay. Could we then set on for the next omnibus hearing -- we will bring on a motion --

THE COURT: Fine.

MR. BERNICK: -- for the next omnibus hearing to conduct discovery against the law firms to find out about these relationships --

THE COURT: That's fine.

MR. BERNICK: -- and the alternative against the doctors.

THE COURT: Bring that motion on. Take (a) out and amend (b) --

MR. BERNICK: Fine.

THE COURT: -- as we've talked about earlier. All right. Is that it?

MR. LOCKWOOD: Subject to the fact, Your Honor, that for the reasons previously stated, and I think exemplified by the discussion that we've had going through the questionnaire, which is that this -- almost every question here has -- goes to the merits of individual cases, and, therefore, we continue to object to the overwhelming majority of the questions, we're through.

THE COURT: Okay, then with respect to the case management order, it needs to be modified I think once you get the -- your questionnaire straight. Are you going to be able, based on what we talked about earlier, to come to some agreement about the time frames to be put in the CMO?

MR. LOCKWOOD: I believe we already agreed that the debtors got -- essentially have gotten their questionnaire, and we agreed on a case management order with the debtors, as Mr. Bernick recited, as to what would happen if the debtors got their questionnaire.

THE COURT: All right.

MR. LOCKWOOD: So I don't --

THE COURT: So then I will expect to get from you on

a certification of counsel the case management order with the revised questionnaire.

MR. LOCKWOOD: There are some questions that Mr. Frankel raised earlier about specific provisions in that, and I think my partner, Nate Finch, may have one or two additional ones that are separate from the time table.

THE COURT: All right. Mr. Bernick, if you need to leave --

MR. BERNICK: Yes, I'm sorry really. I apologize, Your Honor, but I --

MR. FINCH: So what I would suggest is that Mr. Bernick and Mr. Frankel and I discuss the -- there are a few wiggles with the CMO that I don't agree to in terms of the timing. I mean not so much the brought out ones, but there are a couple of dates in there that I want to discuss with him.

THE COURT: All right. That's fine.

MR. FINCH: And also there's one other issue, Your Honor, which I want to flag, and I don't know what the debtor's position will be on this. There was a fair number of fact witness depositions taken in the context of the Sealed Air litigation concerning the standards by which Grace would resolve claims and how it set its reserves and what evidence it would require before it would pay a claim. I deposed the former General Counsel of the company, the former Associate General Counsel of the company. I would like all those

depositions to be useable in this proceeding to the same extent as if they were taken in this case, so I don't have to go out and re-depose all those people.

THE COURT: Well, that makes sense.

MS. HARDING: Your Honor, there was one --

THE COURT: You need to use the microphone.

MS. HARDING: I'm sorry. It's Barbara Harding for Kirkland, Your Honor. Thank you. During our negotiation on the CMO, I think we should talk about that, because at the negotiation there was discussion about how those depositions would be used, and apparently, there were some rulings or discussion by the Court at that time, and we wanted an opportunity to go back and look at the record --

THE COURT: All right.

MS. HARDING: -- before we agreed.

THE COURT: Okay. If there -- are they under seal?

MR. FINCH: There's a confidentiality order as part of this Sealed Air case, and I don't think there's anything that was really said in that deposition -- in any of those depositions that is confidential. What I don't want to do is -- and I think depositions are admissions as against Grace and as against the Equity Committee. I don't want the Commercial Creditors Committee or some other committee to come in here and say, oh, I wasn't present at that deposition. I'm going to make you go back and re-ask Mr. Beeber or Mr. Hughes, who was

sitting in the courtroom -- still is sitting in the courtroom back there, all the same questions you asked him in the summer of 2002. That's what I'm trying to avoid.

THE COURT: Well, if some other entity has additional discovery they want to take, perhaps they can take it. If your discovery is done, it seems to me your discovery is done. They can get copies of the transcript, unless there's some prohibition against it, and I don't know why there would. And if they've got additional questions to ask, they can do it.

MR. FINCH: Well, they could -- sure, they could go ask additional questions. What I don't want -- I want to make clear is that the questions that I asked and the answers that I got don't have to -- I don't have to go back and ask the same three hours of questions of the guy. That --

THE COURT: You don't need to re-ask the same questions provided that there is no bar that Judge Wolin imposed of which I'm not aware, but I don't know all the ins and outs of that litigation. I didn't follow it that closely. So why don't you talk about it as part of the case management order? It makes good sense that you don't redo things.

MS. HARDING: We will, Your Honor.

THE COURT: All right. Anyone else?

MR. CARICKHOFF: Your Honor, David Carickhoff for the debtors.

THE COURT: Yes.

MR. CARICKHOFF: I think you had set aside August 17th to deal with the issues that we've addressed today. I just want to -- didn't you set a -- I thought you set a separate August 17th date to deal with it. I just want to be --

MR. LOCKWOOD: That's my recollection, Your Honor.

THE COURT: Well, then --

MR. LOCKWOOD: I had arranged my vacation schedule around that, which was why --

THE COURT: Then good work gentlemen getting it done early I guess. So we don't need that hearing?

MR. CARICKHOFF: I just want to clarify that that's off.

THE COURT: There's no -- no one has any issues that have to be addressed then?

(No verbal response)

THE COURT: Okay. It's canceled.

MR. CARICKHOFF: Thank you.

THE COURT: Anybody else?

(No verbal response)

THE COURT: All right. We're adjourned. Thank you.

ALL: Thank you, Your Honor.

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CERTIFICATION

We, TAMMY DeRISI and PATRICIA C. REPKO, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter to the best of our ability.

/s/ Tammy DeRisi Date: July 28, 2005
TAMMY DeRISI

/s/ Patricia C. Repko
PATRICIA C. REPKO

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